No. 333

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JOHN T. FEY, Clerk

The United States Court of Appeals

FOR THE SECOND CIRCUIT

STRATHMORE SHIPPING CO., INC.,
Libellant-Appellant,

against

COASTAL OIL COMPANY,
Respondent-Appellee.

LIBELLANT-APPELLANT'S APPENDIX

CARDILLO & SMITH,
Proctors for Libellant-Appellant,
52 Broadway,
New York 4, N. Y.

BURLINGHAM, HUPPER & KENNEDY,
Proctors for Respondent-Appellee,
26 Broadway,
New York 4, N. Y.

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The United States Court of Appeals

FOR THE SECOND CIRCUIT

STRATHMORE SHIPPING CO., INC., *Libellant-Appellant,* *against*	DOCKET No. 24282
COASTAL OIL COMPANY, *Respondent-Appellee.*	

Statement Under Rule 15(b)

1952	
July 14	Suit commenced by filing of libel and issuance of process in personam with clause for foreign attachment, Messrs. Nelson, Healy, Baillie & Burke, of 52 Wall St., New York, N. Y., appearing as proctors for libellant.
July 28	Respondent's notice of appearance filed. Messrs. Foley & Statt of 80 Broad Street, New York, N. Y., proctors for respondent.
July 29	Return of The Chase National Bank of the City of New York, garnishee, filed disclosing $52,722.59 credit to respondent in hands of garnishee.
December 4	Filed answer of respondent.
1953	
February 16	Filed Note of Issue.

1954	
October 18	Filed order substituting Messrs. Cardillo & Smith of 52 Broadway, New York, N. Y., for Messrs. Nelson, Healy, Baillie & Burke as proctors for the libellant.
1955	
April 8	Filed libellant's request for admissions by respondent.
October 28	Filed order substituting Messrs. Burlingham, Hupper & Kennedy of 27 William Street (now of 26 Broadway), New York, N. Y., for Messrs. Foley & Statt as proctors for the respondent.
November 2	Filed respondent's answer to libellant's request for admissions.
1956	
April 16	Filed deposition of J. M. Patton taken on November 16, 1955 on behalf of respondent.
April 18	Filed deposition of J. Winterberger taken on November 4, 1955, on behalf of respondent.
April 18	Filed depositions of A. T. Vatis and J. T. Vatis both taken on October 31, 1955, on behalf of respondent.
April 25	Trial commenced before Hon. John M. Cashin, U.S.D.J., sitting in admiralty.
April 26	Trial continued.

Statement Under Rule 15(b)

April 27	Filed deposition of R. Marron taken on November 25, 1955, on behalf of libellant.
April 27	Filed deposition of J. C. Martell taken on November 4, 1955, on behalf of libellant.
April 27	Trial continued and concluded. Decision reserved.
June 1	Filed opinion of Cashin, J., and findings of fact and conclusions of law, dismissing libel.
June 7	Filed respondent's bill of costs in the sum of $58.99.
June 7	Filed final decree disinissing libel, with costs, and vacating foreign attachment.
June 21	Filed libellant's notice of appeal to this Court from said final decree, and undertaking for costs on appeal.

There has been no change of parties and, except as indicated above, no substitution of proctors, since the commencement of this action.

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UNITED STATES COURT OF APPEALS

For the Second Circuit

[SAME TITLE]

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Notice of Appeal

[749]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

STRATHMORE SHIPPING CO., INC., as Owner of the Steamship STRATHBAY, *Libellant,* *against* COASTAL OIL COMPANY, *Respondent.*	Ad. 173-298

Sirs:

PLEASE TAKE NOTICE that STRATHMORE SHIPPING COMPANY, INC., the libellant in the above-entitled cause, hereby appeals to the next United States Circuit Court of Appeals for the Second Circuit to be held in the United States Court House, Borough of Manhattan, City of New York, from the final decree of this Court entered herein the 7th day of June, 1956, and from each and every part of said decree.

Dated, June 20, 1956.

Yours, etc.,

CARDILLO & SMITH
Proctors for Libellant
52 Broadway
New York City

To:

BURLINGHAM, HUPPER & KENNEDY, ESQS.
27 William Street
New York City
Proctors for Respondent

Decree Appealed From

[747]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The above-entitled suit having duly come on to be heard before this Court on the 25th, 26th and 27th days of April, 1956, upon the proceedings and proof adduced by the respective parties hereto, and the cause having been argued and submitted by the respective advocates; and the Court, after due deliberation, having rendered its decision, findings of fact and its conclusions of law, and dismissing the libel on the merits with costs; and the costs of the respondent having been taxed by the Clerk of this Court in the sum of $58.99;

Now, on motion of Burlingham, Hupper & Kennedy, proctors for respondent, it is

ORDERED, ADJUDGED AND DECREED that the libel herein be, and the same hereby is, dismissed on the merits with costs; and it is further

ORDERED, ADJUDGED AND DECREED that Coastal Oil Company, respondent, recover of and from the libellant, Strathmore Shipping Company, Inc., the sum of $58.99, its costs as taxed, with interest thereon until paid and that respondent have judgment and execution therefor; and it is further

ORDERED that unless this decree be satisfied or an appeal is taken therefrom within ten (10) days after [748] service of a copy of this decree, with notice of entry thereof, upon proctors for libellant, the stipulator for costs on the part of libellant cause the engagement of his stipulation to be performed or execution may issue against his goods, chattels, lands and tenements to satisfy this decree; and it is further

ORDERED that the attachment herein of the funds of respondent in the hands of The Chase National Bank of the City of New York under Process in Personam (Foreign Attachment), served July 15, 1952, be, and the same hereby is, in all respects vacated, and that all funds of respondent attached under said process be and they hereby are released.

At New York, New York, in said District on June 7th, 1956.

/s/ JOHN M. CASHIN
U. S. D. J.

Opinion of Court Below

[739]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

OPINION

CARDILLO & SMITH, ESQS.,
Proctors for Libellant,
52 Broadway,
New York, N. Y.

JOSEPH CARDILLO, JR., ESQ.,
CURRAN TIFFANY, ESQ.,
Of Counsel

BURLINGHAM, HUPPER & KENNEDY, ESQS.,
Proctors for Respondent,
27 William Street,
New York, N. Y.

EUGENE UNDERWOOD, ESQ.,
HERVEY C. ALLEN, ESQ.,
Of Counsel

CASHIN, JOHN M.,
U.S.D.J.

[740]

CASHIN, *D. J.*

This is an action by the libellant, Strathmore Shipping Company, Inc. against the respondent, Coastal Oil Company, to recover damages for an alleged breach of a charter agreement.

FINDINGS OF FACT

1. Libellant, as owner of the vessel STRATHBAY, by a written charter agreement dated March 27, 1952 agreed with the respondent to take its vessel to a United States Gulf port to be named by the respondent (which was subsequently duly designated as Corpus Christi, Texas) and there load a cargo of oil and deliver it to a port north of Cape Hatteras to be named by respondent. The charter agreement fixed the rate of hire at the United States Maritime Commission T2 rate plus 190%, and provided that if the vessel should not arrive at the loading port by 4:00 P. M. on April 30, 1952 respondent had the option to cancel the charter provided written notice thereof was given within twenty-four hours, otherwise the charter remained in full force and effect.

2. At the request of libellant, on or about April 10, 1952 a Mr. Winterberger, libellant's Ship's Broker, telephoned Mr. Martell, respondent's Vice-President; and informed him that the libellant wanted an extension of the canceling date of the charter agreement and that in consideration [741] therefor would give a rate reduction of 20 points, that is, from U.S.M.C. T2 plus 190% to plus 170%. Mr. Martell rejected this offer. At this time the general market in tanker charter rates was declining and were already substantially below the figure fixed in the charter agreement of March 27, 1952; also there was imminent the possibility of a strike at the Corpus Christi Oil Refinery.

3. Subsequent offers of reductions in rate, in consideration of an extension of the canceling date, were communi-

cated by Winterberger to Mr. Martell during the next week. On or about April 17th Mr. Martell made a counter-offer in which he offered a 10 day extension if the rates were reduced 70 points, i.e., U.S.M.C. plus 120%, should the vessel arrive by April 30th and a further reduction of an additional 20 points, i.e., U.S.M.C. plus 100%, should the vessel arrive after April 30th. Libellant rejected this offer and sometime on or about April 18th Winterberger, by telephone, communicated an offer of a reduction from a plus 190% to 120% for a straight 10 day extension of the canceling date, whether the vessel arrived or not. Mr. Martell indicated interest in this offer but did not accept it, and in reliance on that interest Mr. Winterberger prepared and forwarded an addendum incorporating this offer signed by libellant, to the respondent.

4. On receipt of the addendum on or about April 21st, Mr. Martell telephoned Mr. Winterberger and told him that in [742] any event the addendum would not be satisfactory as it then read as it provided no protection against the vessel making an intermediate voyage before proceeding to Corpus Christi. He also complained that he felt he had been misinformed about the vessel's present position. At Mr. Winterberger's request libellant's officer called Mr. Martell and gave him information as to the ship's position. Winterberger also obtained libellant's consent to insert a clause in the addendum requiring the vessel to proceed directly to the loading port, which clause Winterberger telephoned to Martell's secretary who typed it on the copy in his possession.

5. In subsequent communications between Martell and Winterberger as to the position of the STRATHBAY, Martell indicated that he still had not accepted libellant's offer. With the passage of time it became increasingly apparent, both to Winterberger and Martell, that the vessel would not reach Corpus Christi by April 30th

6. Respondent never signed or returned the addendum, and on April 28th Martell informed Winterberger that respondent intended to cancel the charter agreement. On April 30th the Sinclair Company informed the respondent that due to the strike no oil cargoes could be loaded after May 2, 1952. A formal notice of cancellation was received by the libellant on May 1, 1952. The vessel STRATHBAY arrived at Corpus Christi in the early afternoon of May 3rd and its tender was [743] not accepted.

CONCLUSIONS OF LAW

1. The libel is dismissed.

As we view this case, the only question involved is the factual one as to the telephone conversation which took place between Winterberger and Martell on or about April 18, 1952. It was during this conversation that libellant claims the extension agreement modifying the written charter was made. It is our opinion, based on all the credible evidence in the case, that Martell on that day did not accept libellant's offer and agree to the extension.

Libellant's version of that conversation was that the respondent, through its Vice-President, definitely accepted its offer and agreed to give the extension on the terms set forth in the addendum. Respondent's version was to the effect that the offer made on April 18th was one of a series of progressively more attractive offers (none of which were accepted) and which was drawn up as an addendum by the Ship Broker and, at his insistence, taken under advisement.

Besides the testimony of respondent's Vice-President [744] Martell, which we found in substance credible, re-

spondent's version of this conversation is supported by these facts. The extension was sought by the libellant and the negotiations were initiated by it. Libellant's need for the extension to it from the beginning, whereas the advantages of libellant's offer to the respondent were becoming less and the disadvantages greater with the passage of time. A substantial change was made in the addendum subsequent to the alleged oral agreement. *American Merchant Marine Insurance Co.* v. *Letton* (2nd Cir) 9 F 2d. 799. The addendum was never signed nor returned by the respondent even though both parties were in constant communication with each other throughout the following two weeks.

All the facts and circumstances relied upon by the libellant as proving an oral modification, we think, are as consistent with its non-existence, especially in view of the fact that the written charter provided for an automatic extension at the option of the respondent. The burden of proof rested with libellant, which it failed to sustain by evidence credible in the light of all the facts and circumstances. *The City of Alexandria*, 40 F. 697.

Dated: New York, N. Y.
May 31st, 1956.

JOHN M. CASHIN
United States District Judge

[321]

To the Honorable the Judges of the United States District Court for the Southern District of New York

AD-173-298

The libel and complaint of Strathmore Shipping Company, Inc., owner of the Steamship Strathbay, against Coastal Oil Company, in a cause of contract, civil and maritime, respectfully alleges upon information and belief:

First: At all the times hereinafter mentioned, libelant was and it still is a corporation organized and existing under and by virtue of the laws of the State of New York, and at all of said times was and it still is the owner of the Steamship Strathbay.

Second: At all the times hereinafter mentioned, respondent was and now is a corporation organized and existing under and by virtue of the laws of one of the States of the United States, with an office and place of business in Newark, New Jersey.

Third: Respondent has no office or place of business within this District, nor is there any person within this District authorized to accept service of process of this Honorable Court on behalf of respondent, but said respondent has or will have during the pendency of process hereunder goods, chattels, credits and effects within this District subject to attachment, including the tank vessel Rosina Marron and certain funds on deposit with the Chase National Bank, 18 Pine Street, New York, N. Y.

Fourth: On March 27, 1952, at New York, a certain written contract of charter party was entered into between libelant, as owner, and respondent, as charterer, whereby libelant, in consideration of a certain agreed freight, based on "Former U.S.M.C. T-2 rate plus 190%", agreed to let, and [322] respondent agreed to hire the Steamship Strathbay (then trading and expected to be ready about April 22, 1952) for a voyage commencing at one safe United

States Gulf port and terminating at one safe United States port north of Cape Hatteras. The said charter party, a true copy of which is annexed hereto, made a part hereof and marked "EXHIBIT A", specified that the "readiness date" was to be April 20, 1952 and the "cancelling date" was to be April 30, 1952.

FIFTH: Subsequently, oral negotiations were conducted between libelant and respondent, which resulted in the making of an oral charter party, on April 18, 1952, including the same terms and conditions as were contained in the aforesaid written charter party, marked "EXHIBIT A", except that the "cancelling date" was made May 10, 1952 and it was agreed that the rate for freight, demurrage and extras would be "Former U.S.M.C. T-2 rate plus 120%." Thereafter, and on April 22, 1952, it was further agreed between libelant and respondent that immediately upon completion of discharge of the cargo which was being carried on the then current voyage, the STRATHBAY should proceed to Corpus Christi, Texas, for loading.

SIXTH: In accordance with the terms of the said oral charter party, the Steamship STRATHBAY proceeded to Corpus Christi and, on May 3, 1952, was tendered to respondent at that port, in all respects seaworthy and ready to perform her obligations and those of libelant under the said oral charter party.

SEVENTH: Respondent nevertheless refused to accept the tender of the vessel and refused to abide by the terms of the said oral charter party and failed to pay libelant the agreed freight in accordance with the terms of the said oral charter party.

[323] EIGHTH: Libelant has performed all of the obligations under said oral charter party on its part to be performed.

NINTH: By reason of the premises, libelant has sustained damages in the amount of approximately Sixty-Five Thousand Dollars ($65,000.00), as nearly as can be

estimated at this time, no part whereof has been paid, although duly demanded.

TENTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law, according to the practice of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue against respondent, Coastal Oil Company, citing it to appear and answer, on oath, all and singular the matters aforesaid; that if said respondent cannot be found within this District, its goods, chattels, credits and effects within this District including the Tank Vessel ROSINA MARRON and its funds on deposit with the Chase National Bank, 18 Pine Street, New York, N. Y., may be attached by process of foreign attachment in the amount of Sixty-Five Thousand Dollars ($65,000.00) the amount sued for in this libel, together with interest and costs; that the said vessel, her engines, boilers, etc., may be sold under the direction of this Honorable Court, and the proceeds of said sale be brought into this Court; that said funds on deposit with the Chase National Bank may be brought into this Court; that this Court may render a decree in favor of libelant in the amount of Sixty-Five Thousand Dollars ($65,000.00), together with interest and costs, and that libelant may have such other and further [324] relief as may be just and proper.

NELSON, HEALY, BAILLIE & BURKE
Proctors for Libelant
52 Wall Street
New York 5, N. Y.

(Verified July 14, 1952, by John T. Vatis, as President of Strathmore Shipping Co., Inc.)

[A copy of the original charter party annexed to the libel as Exhibit A, is here omitted. The charter party is Libelant's Exhibit 1 and will be handed up with the exhibits.]

[335]

Answer

To the Honorable the Judges of the United States District Court for the Southern District of New York

The answer of Coastal Oil Company to the libel and complaint of Strathmore Shipping Company, Inc., as owner of the steamship Strathbay, in a cause of contract, alleges upon information and belief, as follows:

First: Respondent admits the allegations contained in the First article of the libel.

Second: Respondent admits the allegations contained in the Second article of the libel.

Third: Respondent admits that it has no office or place of business within this District; that there is no person within this District authorized to accept, on its behalf, service of process of this Honorable Court; that at the time of the filing of the libel and the issuance of process with a clause of foreign attachment it had certain funds on deposit with The Chase National Bank, 18 Pine Street, New York, N. Y., and denies the other allegations contained in the Third article of the libel.

Fourth: Respondent admits the allegations contained in the Fourth article of the libel.

Fifth: Respondent denies the allegations contained in the Fifth article of the libel.

Sixth: Respondent denies the allegations contained in the Sixth article of the libel.

Seventh: Respondent denies the allegations contained in the Seventh article of the libel.

EIGHTH: Respondent denies the allegations contained in the Eighth article of the libel.

NINTH: Respondent admits demand and non-payment, and denies the other allegations contained in the Ninth article of the libel.

TENTH: Respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and denies the other allegations contained in the Tenth article of the libel.

FURTHER ANSWERING, RESPONDENT ALLEGES UPON INFORMATION AND BELIEF THAT THE TRUE FACTS ARE AS FOLLOWS:

ELEVENTH: On or about the 27th day of March, 1952, a charter party, in writing, was entered into between the respondent as charterer and the libellant as owner, whereby libellant agreed to let and the respondent agreed to hire the steamship Strathbay, then trading and expected ready about April 22, 1952, for a voyage from one (1) safe port U. S. Gulf to one (1) safe port north of Cape Hatteras, at an agreed rate of freight; said charter party provided that the readiness date was April 20, 1952 and that the cancelling date was April 30, 1952.

TWELFTH: The respondent, the charterer, named Corpus Christi as the loading port for a cargo of fuel oil to be carried to one safe port U. S. north of Hatteras, Port Newark. The Strathbay was not at Corpus Christi and ready to load by 4:00 P.M. (local time) on April 30, 1952, in accordance with the terms of said charter party. Respondent on that date notified libellant orally that it cancelled said charter. Respondent served a written notice of cancellation upon libellant at 12:20 P.M. on May 1, 1952, all in conformity with the terms of said charter party.

THIRTEENTH: By virtue of the said cancellation, pursuant to the terms of said charter party, the said charter party was cancelled and terminated as of April 30, 1952, and the respondent was relieved from any obligation thereunder.

FURTHER ANSWERING, RESPONDENT ALLEGES UPON INFORMATION AND BELIEF, AS FOLLOWS:

FOURTEENTH: That the carriage of the cargo provided for by the said charter party was a coastwise voyage.

FIFTEENTH: Seventy-five percent (75%) of the stock of the libellant was not owned by citizens of the United States, and pursuant to Sections 2 and 9 of the Shipping Act of 1916, the Strathbay could not have carried cargo on a coastwise voyage, and pursuant to Section 27 of the Shipping Act of 1920, any merchandise so carried by the Strathbay on a coastwise voyage would have been subject to the penalty of forfeiture.

SIXTEENTH: That as a consequence thereof, the said charter party was void from its inception for illegality.

All and singular the premises are true.

WHEREFORE, respondent demands judgment that the libel herein be dismissed with costs.

FOLEY AND STATT
Proctors for Respondent.

(Verified Dec. 3, 1952, by Nelson L. Ott, as Executive Vice-President of Coastal Oil Company.)

Libellant's Request for Admissions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that pursuant to United States Supreme Court Admiralty Rule 32(b), libellant hereby requests respondent to admit in ten days after service of this request, for the purpose of this suit only, and subject to pertinent exceptions as to admissibility which may be interposed at the trial.

FIRST: That on or about April 17, 1952, James Martell of Coastal Oil Company had telephone conversations with Joseph Winterberger of Simpson, Spence & Young about the vessel "STRATHBAY".

SECOND: That in one such conversation, Mr. Winterberger conveyed to Mr. Martell an offer of the owners of the "STRATHBAY" to give to Coastal Oil Company a chartering rate of U. S. M. C. plus 140% if the vessel was tendered by April 30, 1952, and 120% if tendered within ten days thereafter, other terms to be the same as in the written charter party dated March 27, 1952 referred to in Article Fourth of the libel herein.

[348] THIRD: That Mr. Martell, in behalf of Coastal Oil Company, declined the said offer.

FOURTH: That in one such conversation, Mr. Martell offered in behalf of Coastal Oil Company to accept a rate of U. S. M. C. plus 120% if the vessel was tendered by April 30, 1952, and U. S. M. C. plus 100% if tendered within ten days thereafter, other terms to be as in the aforementioned written charter party.

FIFTH: That Mr. Winterberger conveyed to Mr. Martell the non-acceptance by the vessel's owners of the said offer made by Mr. Martell.

SIXTH: That in one such conversation, Mr. Winterberger conveyed to Mr. Martell an offer of the vessel's owners to give to Coastal Oil Company a chartering rate of 120%, the vessel to be tendered by May 10, 1952, other terms to be as in the aforementioned written charter party.

SEVENTH: That Mr. Martell, in behalf of Coastal Oil Company, stated to Mr. Winterberger that he accepted and agreed to the terms of the last mentioned offer.

EIGHTH: That on or about May 3, 1952 a telegram purporting to be a notice of readiness of the vessel "STRATHBAY" was delivered to Coastal Oil Company in care of Sinclair Refining Company at Corpus Christi, Texas.

NINTH: That on May 3, 1952, the "STRATHBAY" was at Corpus Christi, Texas.

TENTH: That on or about May 5, 1952, a telegram purporting to be a notice of readiness of the vessel "STRATHBAY" [349] was delivered to Coastal Oil Company at its office at Newark, New Jersey.

ELEVENTH: That at the time of the conversations aforementioned, Mr. Martell was Vice-President of Coastal Oil Company.

TWELFTH: That at the times of the conversations aforementioned Mr. Martell had authority in behalf of Coastal Oil Company to enter into binding agreements to charter.

THIRTEENTH: That on or about May 1, 1952, Mr. Martell advised Mr. Winterberger by telephone that Coastal Oil Company "cancelled" its charter of the vessel "STRATHBAY".

FOURTEENTH: That one ground for such cancellation stated by Mr. Martell was that the owners of the "STRATHBAY" had misrepresented her position.

FIFTEENTH:- That at no time during the telephone conversation last mentioned, and at no time on May 1, 1952, or prior thereto, did Mr. Martell advise the "STRATHBAY'S" owners or any representative of the "STRATHBAY'S" owners that Coastal Oil Company had any objections or complaints as to the citizenship of the owners of the "STRATHBAY".

SIXTEENTH: That on or about May 1st or May 2nd, Coastal Oil Company was advised that the owners of the "STRATHBAY" refused to recognize any cancellation.

SEVENTEENTH: That at no time on or about May 1, 1952, and at no time prior thereto, did any representative of Coastal Oil Company advise any representative of libellant herein that Coastal Oil Company had any objections or complaints as to the citizenship of the owners of the "STRATHBAY". [349]

[350] EIGHTEENTH: That on March 27, 1952, a United States certificate of enrollment and license for the "STRATHBAY" was outstanding which was valid on its face.

NINETEENTH: Such certificate was outstanding on April 30, 1954, May 1, 1954, and May 3, 1954.

Dated, New York, April 1, 1955.

CARDILLO & SMITH,
Proctors for Libellant,
No. 52 Broadway,
New York 4, New York.

To:

FOLEY AND STATT,
Proctors for Respondent,
80 Broad Street,
New York 4, New York.

[389]

Respondent's Answer to Libellant's Request for Admissions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Respondent, Coastal Oil Company, answering libellant's Request for Admissions, dated April 1, 1955, states as follows:

FIRST: Respondent admits that in or about the middle of April, 1952 James Martell, Vice-President of Coastal Oil Company, had telephone conversations with Joseph Winterberger of Simpson, Spence & Young concerning the vessel STRATHBAY. Respondent is unable to specify the exact date or dates of any such conversations, but believes that one or more of them took place on or about April 17, 1952.

SECOND: Respondent admits that in a telephone conversation between Mr. Winterberger and Mr. Martell in or about the middle of April, 1952 Mr. Winterberger conveyed to Mr. Martell an offer of the owners of the STRATHBAY containing the terms set forth in the libellant's Second Request for Admissions, dated April 1, 1955. Respondent is unable to specify the exact date on which such conversation took place, but believes that it may have occurred on or about April 17, 1952.

THIRD: Admitted.

FOURTH: Respondent admits that in a conversation between Mr. Martell and Mr. Winterberger in or about the middle [390] of April, 1952 Mr. Martell made an offer in behalf of Coastal Oil Company containing the terms stated in

Respondent's Answer to Libellant's Request for Admissions

libellant's Fourth Request for Admissions, dated April 1, 1955. Respondent is unable to specify the date on which such conversation took place, but believes that it may have occurred on or about April 17, 1952.

FIFTH: Admitted.

SIXTH: Respondent admits that in or about the middle of April, 1952 a conversation took place between Mr. Winterberger and Mr. Martell in which Mr. Winterberger conveyed to Mr. Martell an offer containing the terms stated in libellant's Sixth Request for Admissions, dated April 1, 1955. Respondent is unable to specify the date when such conversation took place, but believes that it may have taken place on or about April 17, 1955.

SEVENTH: Denied.

EIGHTH: Admitted.

NINTH: Admitted.

TENTH: Admitted.

ELEVENTH: Respondent admits that throughout April, 1952 Mr. Martell was Vice-President of Coastal Oil Company. Respondent repeats its denial of libellant's Seventh Request for Admissions, dated April 1, 1955.

TWELFTH: Respondent admits that during the entire month of April, 1952 Mr. Martell had authority to charter vessels for or in behalf of Coastal Oil Company. Respondent repeats its denial of libellant's Seventh Request for Admissions, dated April 1, 1955.

THIRTEENTH: Respondent admits that on or about May 1, 1952 Mr. Martell advised Mr. Winterberger by telephone that Coastal Oil Company cancelled the charter party of the vessel STRATHBAY, dated March 27, 1952, between respondent and libellant.

[391] FOURTEENTH: Denied.

Respondent's Answer to Libellant's Request for Admissions

FIFTEENTH: Respondent admits that at no time on May 1, 1952, or prior thereto, did Mr. Martell advise the owners of the STRATHBAY or any representative of said owners that Coastal Oil Company had any objections or complaints as to the citizenship of the owners of the STRATHBAY. Respondent repeats its denial of libellant's Fourteenth Request for Admissions, dated April 1, 1955.

SIXTEENTH: Admitted.

SEVENTEENTH: Admitted.

EIGHTEENTH: Respondent's Eighteenth Request for Admissions, dated April 1, 1955, has been amended to read as follows:

> "The ownership of the STRATHBAY did not change in the period from May 16, 1951, through May 3, 1952."

Answering this request as amended, respondent states that it has no knowledge or information indicating that there was any change of ownership of the STRATHBAY during the period May 16, 1951-May 3, 1952.

NINETEENTH: Libellant's Nineteenth Request for Admissions, dated April 1, 1955, has been withdrawn.

Dated: October 31, 1955

BURLINGHAM, HUPPER & KENNEDY,
Proctors for Respondent.
Office & Post Office Address:
27 William Street
New York 5, New York

To:
MESSRS. CARDILLO & SMITH,
Proctors for Libellant.
52 Broadway
New York 4, New York

Respondent's Answer to Libellant's Request for Admissions

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STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.:

JAMES C. MARTELL, being duly sworn, says that he is Vice-President of Coastal Oil Company, respondent herein; that he has read the foregoing answers to libellant's request for admissions and that the same are true to the best of his knowledge and information; that said answers are based on his personal knowledge and on information contained in documents in his possession; that the reason why this verification is not made by respondent is that respondent is a foreign corporation.

Sworn to before me this
31st day of October, 1955

JAMES C. MARTELL

HAROLD H. FISHER
A Master of the Superior Court of New Jersey

[1] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

STRATHMORE SHIPPING CO., INC.,
Libelant,

vs.

COASTAL OIL COMPANY,
Respondent.

A. 173-298

New York, N. Y.,
April 25, 1956
10:30 a.m.

Before:

HON. JOHN M. CASHIN,
District Judge.

Appearances:

CARDILLO & SMITH, Esqs., Proctors for Libelant;
J. CARDILLO, JR., Esq., and C. TIFFANY, Esq.,
of Counsel:

BURLINGHAM, HUPPER & KENNEDY, Esqs.,
Proctors for Respondent;
EUGENE UNDERWOOD, Esq., and H. C. ALLEN, Esq.,
of Counsel.

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[2] The Court: Both sides ready?

Mr. Cardillo: Yes, your Honor.

Mr. Underwood: Yes, your Honor.

The Court: Proceed.

Mr. Cardillo: Would your Honor like an opening statement?

The Court: I would.

Mr. Cardillo: This is an action brought by the Libelant Strathmore Shipping Company for breach of a charter-party and damages consequent upon such breach.

Essentially, the proof of the Libelant will be that a charter-party was entered into on March 27th of 1952, for the carriage of petroleum from the Sinclair plant at Corpus Christi, Texas, to the Respondent's plant at Port Newark, New Jersey.

Actually, the charter-party provided that the loading port would be one safe Gulf port. Sometime after the charter-party was entered into, the vessel in question, which was the vessel, "Strathbay," encountered a series of minor difficulties with the result that the Libelants were concerned lest the vessel would not arrive by the cancelling date of the charter-party.

[3] The cancelling date was April 30th. Her expected readiness at the time of entering into the charter-party was April 23, 1952.

The Libelant, Strathmore Shipping Company, through the chartering-broker, Mr. Winterberger of the firm of Simpson, Spence and Young, approached the Respondents for an extension of the cancelling date. There were a series of negotiations which followed between about April 8 to April 17 or 18th, all of which culminated—that is the Libelant's contention—in a so-called addendum to the charter-party, which had the effect of creating a new oral charter-agreement.

The new agreement provided that the cancelling date was to be extended from April 30th to May 10, 1952, in consideration for which the vessel-owners were to reduce the rate of carriage from the former U.S.M.C. —that is United States Maritime Commission T-2 tanker rates—plus 190 per cent to plus 120 per cent.

There were a series of further communications between the Respondents and the broker in question, none

of which had to do, in essence, with the charter-addendum until about May 1st, in the morning. The [4] essence of the prior conversations were, in effect, to give the charterer data with regard to the position of the vessel so that he, in turn, might notify the Sinclair people as to the time the vessel would be expected to arrive, and, also, a negotiation was entered into about one or two days—I am sorry, about five or six days after the new agreement,—to the end that the Respondents might engage the vessel for a subsequent voyage following the one in question.

That negotiation didn't come to fruition, but on May 1st, in the morning, the Vice-President and General Manager of the Respondent, telephoned the broker in question and advised him that they were cancelling the charter-party.

On the same day, in the afternoon, they caused a letter to be sent to Libelant, in which they allege that they were cancelling the charter-party because the vessel failed to arrive by the cancelling date of April 30th. The Libelant refused to accept the cancelling on the ground, as I have already stated, that they had already entered into agreement to extend the cancelling date, which was in effect the creation of a new charter-party.

[5] That is essentially the background of the action. The vessel was unable to engage other business for the period it had at hand between the time it arrived and tendered under the charter, and the lay days of the next engagement for the vessel. She tendered, as I recall, to the Pure Oil Company on about May 17 of 1952. She actually arrived at Corpus Christi, Texas, at the Sinclair plant intended under the charter under dispute, on May 3rd. Damages are claimed for the alleged breach.

I think that essentially covers the Libelant's position. There are one or two other things that I should

like to discuss with Mr. Underwood and your Honor with regard to possible stipulations in order that we may eliminate the testimony in the matter.

The Court: How long will this case take?

Mr. Cardillo: I should say it will take from two to two-and-a-half days. It should be finished on Friday.

Mr. Underwood: If your Honor please, the Libelant in this case alleges that after the making of the original charter-party in writing, a subsequent oral charter-party was made on April 18, 1952. That is the issue in this case, whether such an oral charter-party [6] was made on April 18, 1952.

We stand on the original written charter-party. There is no doubt that that document required the Libelant in this case to send its ship to a loading port at all events, even if late. There is no doubt of that unless that original written document was changed, and there is no claim that it was changed in writing, but only orally.

The Court: Even though it is an oral change, that is legal.

Mr. Underwood: Yes, if a new oral agreement can be proved, it is perfectly legal. There is no doubt that under that original written agreement this respondent had the absolute right to cancel that charter upon the non-arrival of the vessel within the time-limit.

There is no doubt that she did not arrive within the time-limit in the original agreement, and, there is no doubt that the cancellation-notice was properly given within the twenty-four hour period fixed by the original charter-party.

So, it all turns upon this allegd oral agreement.

The Court: It is not a question of fact whether or not there was a new oral agreement?

[7] Mr. Underwood: Yes, and as to that, there are some background facts, too, the principal ones that I should like to mention.

One is that during the latter two-thirds of April, 1952, a strike of the refinery workers was becoming increasingly imminent. If a strike occurred it would, as indeed it eventually did, stop all loading at the Sinclair plant where this vessel was to be loaded, the only place this respondent had oil at that time.

These charters contained a demurrage clause. If the ship had made timely tender, she would have been on demurrage and this Respondent would have had to pay a handsome price for her for a period, as it turned out, of about seventeen days, although getting no use of her.

That strike was hanging over everybody's head at the time. It is said that the Libelant had to send the ship there anyway.

There is another background fact, too, and that is equally significant. The market was steadily falling. There is not quite as much of a market as there is in the New York Stock Exchange, but there is a regular and general market in the charter of these [8] tankships as well as dry-cargo ships.

I think the evidence will show that that market was steadily, steadily falling, falling, falling.

I will ask your Honor, in summation, when the evidence is all in, to take those two large background facts into consideration in deciding the probability of this Respondent giving an extension of time when it would face a possible large demurrage claim, and, when the market was steadily falling and it could give a shipper a cheaper price as each day ensued.

The Court: With whom were these conversations had?

Mr. Underwood: Mr. Winterberger, acting as Libellant's broker, and Mr. Martell, an officer of the Respondent.

The Court: There will be no question about the fact that if there were such an oral agreement, the one who made it had power and authority to make it?

Mr. Underwood: There is no doubt that Mr. Marbell had the authority.

The Court: All right.

Mr. Cardillo: If your Honor please, there is no doubt that Mr. Winterberger had authority, and I assume we will both stipulate that either party, or both [9] parties had authority to enter into a new agreement.

Mr. Underwood: I can make no such stipulation about Mr. Winterberger. I have no knowledge of his authority. That is a matter of proof.

Mr. Cardillo: With regard to certain other matters, in this case, your Honor, I am mindful first and foremost of the question of damages. In a pre-trial memorandum, I had submitted to your Honor about two weeks ago, we suggested the possibility that damages might be presented right here, or, if your Honor preferred, the matter could be referred to a Commissioner for determination.

It was my thought, and I so expressed it in the memorandum, that damages are fairly easy of ascertainment in this matter. In other words, the charter-rate is quite clear if the oral agreement is proved—

The Court: Between April 30th and May 17th, would it only involve the time of—

Mr. Cardillo: We don't have to calculate it that way. All we need do is calculate what the freight would have been if the charter were considered. There would have been an overlap. In other words, this vessel, if it had performed the charter when [10] it tendered, would have taken some eighteen days. There consequently would have been an overlap of three days, or three and a half days between the period which would have been consumed and the time it tendered under the next charter party.

If we calculated the freight under the oral charter-agreement, which is simply a matter of mathematics,

and also calculated the freight on the next charter, which is simply a matter of determining or examining the charter-party and, again, mathematics, and deducting that proportion of those rates—

The Court: I think I am going to leave the question of damages, if we get to that question,—

Mr. Underwood: Your Honor, there are very serious issues of damage here that Mr. Cardillo doesn't realize. I think it would be much better to follow the usual procedure.

The Court: I think so.

Mr. Cardillo: There is one other matter that I should like to have straightened out before we proceed, if your Honor please. I had discussed with Mr. Underwood— as it happens in this action, both Mr. Underwood's firm and my own are substitute counsel. The original counsel for the Respondent had alleged [11] or asserted the defense of citizenship. I have discussed the matter with Mr. Underwood. I have advised him I felt there was no basis for it. I also informed him what I understand to be the basis for it. Mr. Underwood advised me, in the course of our discussions, that he personally was inclined to agree, after having looked the matter over, that he would recommend to his clients that the defense be withdrawn and would advise me.

In due course, he did advise me that they would go along with him on that and, in answer to a suggestion that we have a stipulation on it, he stated that we could easily stipulate it at the trial.

Under the circumstances, I should like the record to show, if Mr. Underwood will confirm my statements, that the defense asserted, of citizenship, is withdrawn.

Am I correct, Mr. Underwood?

Mr. Underwood: I don't see the point in rehashing all the long-winded preliminaries of it, but the fact is that the defense is withdrawn.

The Court: All right.

Mr. Cardillo: Captain Vatis, will you please take the stand?

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[12] JOHN T. VATIS, called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cardillo:

Q. Mr. Vatis, you are also known as Captain Vatis, are you not? A. That is right.

Q. Where do you reside? A. At 291 Ridgeway, White Plains, New York.

Q. Are you the President of the Libelant in this matter, Strathmore Shipping Company? A. I am.

Q. Were you such officer in 1952, throughout the year? A. Yes, I was.

Q. What vessels did the Strathmore Shipping Company own in 1952? A. We owned the Strathbay, the Strathcape and the Strathport.

Q. Did you own the Strathbay throughout the year 1952? A. Yes.

Q. In March of 1952, did you, as president of your Company, take any steps for the chartering of the Strathbay?

[13] Mr. Underwood: If your Honor please, I dislike to interrupt, but if it can shorten the proceedings any, I, of course, admit the making of the original charter-party.

Mr. Cardillo: That would help; thank you.

I should like to offer in evidence the original of the charter-party of March 27th.

Mr. Underwood: No objection.

(Charter-party referred to above marked Libelant's Exhibit No. 1 and received in evidence.)

By Mr. Cardillo:

Q. Captain Vatis, I show you Exhibit 1 of Libelant, which is the charter-party of March 27, 1952, and ask you

to the best of your recollection—and you may examine the charter if you so wish,—on what date the Strathbay was obliged to report to the loading port?

Mr. Underwood: I object, if your Honor please. The exhibit speaks for itself.

The Court: I should think so. That is provided in that exhibit; isn't it?

Mr. Cardillo: Yes, it is, your Honor.

Mr. Underwood: Can we agree on April 30th, at 4:00 p.m.?

Mr. Cardillo: Yes, we can.

[14] The Court: That is the boat "Strathbay"?

Mr. Cardillo: The vessel "Strathbay", yes, your Honor.

Q. Did you at any time in April of 1952 check the position of the vessel "Strathbay"? A. Yes.

Q. Did you do so particularly with relation to her obligation under this charter-party?

Mr. Underwood: If your Honor please, I don't think this is material. I object to it.

The Court: Yes, if he did it, I think it is material. If he did it, I will allow that.

Why he did it, I don't think that is material.

Mr. Cardillo: Yes, your Honor, this leads up entirely to the agreement in question.

The Court: Yes, but he checked on it and then you go on from there. He said he did check on it, where it was.

Q. Was there any question in your mind that the vessel might not arrive by the cancelling date, under the charter?

Mr. Underwood: I object.

The Court: I will allow that. Overruled.

A. On April 8th, after checking into the position of the ship, it was evidence that we may not have been able [15] to

report by April 30th, which was the cancelling date, due to several small mishaps that happened on the two preceding voyages.

One instance was that the ship lost about one day at New Orleans, when the channel was blocked by a ship that was aground. Then, the second instance, we lost a day and a-half at Baton Rouge when we were ordered to wait before going alongside, and then, on the third instance, we were pumping rather slow a cargo of molasses at New Orleans on the preceding voyage which delayed the vessel approximately another two days.

So, by April 8th, it was evident that we may need a few additional days over-and-above the April 30th cancelling date because of all these days that were lost on the preceding voyages.

Q. What did you decide to do on that occasion? A. I got in touch with Mr. Winterberger, who was the broker, and asked him to get in touch with the charterers and to ask them whether they would be willing to give us a few days more—we giving them, as a return, a reduction in the rate, in the charter-rate, to make it attractive for them. I suggested that he come down from the original rate of plus 190 to a rate of plus 170.

Q. What was the consideration for that reduction? [16] A. Well, that was a consideration to induce them to give us three or four days additional on the cancelling date.

Q. Did Mr. Winterberger ever report to you later as to whether or not he did, in fact, communicate with the Respondent, Coastal Oil Company? A. Well, I left New York the next day and was absent from the office, I should think about four or five days out of each week for the next two months. The rest of the details of the agreement were handled between my brother and Mr. Winterberger.

Q. Did you have any further communication with anyone in the office of Simpson, Spence & Young, that is, with Mr. Winterberger or anyone else, with regard to the vessel or its chartering to the Respondent? A. On April 28th—

Mr. Underwood: If your Honor please, I object to the conversations unless they are in some way binding upon this respondent.

The Court: I don't know that at this particular time. I will allow it. He said he had conversation with somebody in Winterberger's office.

Mr. Underwood: Winterberger is this Libelant's broker.

[17] The Court: I will allow it, subject to your motion to strike it out.

A. On April 28th, Mr. Winterberger advised me that he received orders from the charterers that the vessel is to proceed to Corpus Christi to load under this charter. At the time, the ship was in New Orleans, discharging, and she was expected to leave from New Orleans in a couple of days.

We transmitted these order to the Master of the ship, that he was to proceed to Corpus Christi to load, and the vessel subsequently sailed from New Orleans for Corpus Christi.

The Court: Who told you that?

The Witness: Mr. Patton, of the firm of Simpson, Spence & Young, who, in turn, got it from the charterers.

Mr. Underwood: I move to strike it out.

The Court: The latter part of the answer may be stricken out.

Mr. Cardillo: If your Honor please, with regard to this witness, he took no further part in the negotiations until the cancellation came into play. For the convenience of the court and the chronology of it I should like to excuse this witness at the present time and bring out the subsequent events. I would like to [18] bring out the subsequent events chronologically and then recall this witness in that regard.

The Court: You haven't any objection to that, have you?

Mr. Underwood: Well, not really. I don't think there is any real dispute as to what happened on May 1st, anyway. Of course, I would like to go forward on my cross-examination at this time.

The Court: At this time, you may. He may do that so far as he has testified.

Mr. Cardillo: Yes, there is no question about that. One more thing, please:

By Mr. Cardillo:

Q. Captain Vatis, I show you Respondent's Exhibit 8—

The Court: Mark it as an exhibit here. It would be *Libelant's Exhibit 2, formerly marked Respondent's Exhibit 8.*

Mr. Underwood: No objection.

(Document above referred to, heretofore marked Respondent's Exhibit 8, is now received and marked Libelant's Exhibit 2 in evidence.)

By Mr. Cardillo:

Q. Captain Vatis, is this the advice that you sent to [19] the Master on April 28th? A. Yes, *this was the orders, the voyage-orders given by myself to the Master of the "Strathbay".*

Q. Was that sent *as a consequence of the information received by you from Mr. Patton?* A. That is right.

Mr. Cardillo: That is all for the present, your Honor, subject to recall.

Cross-Examination by Mr. Underwood:

Q. Is it correct, Captain Vatis, that the information you got from Mr. Patton on the 28th that the vessel was to load at Corpus Christi, was the first information that you had that Strathmore had to send the ship to Corpus Christi to load? A. No; I don't think so. The first official orders, yes.

Q. Is that the first time, April 28th, the first time that your company knew that this vessel had to go to Corpus Christi to load? A. I believe so.

Q. You so said on your deposition, did you not? A. I believe so, yes, sir.

Q. I show you a paper that has previously been marked Libelant's Exhibit 2 for Identification—

[20] Mr. Underwood: Shall I have it marked otherwise?

The Court: Yes.

(Document referred to, heretofore marked Libelant's Exhibit 2 for Identification, is now marked Respondent's Exhibit A for Identification.)

By Mr. Underwood:

Q. I show you Respondent's Exhibit A for Identification, Mr. Vatis, and ask you if that is your signature under the typewritten name of Strathmore Shipping Company? A. Yes, it is.

Q. Do you see the typewritten provision not very far above your signature that has something to do with going to Corpus Christi? A. Yes, I do.

Q. Did you know about that? A. Yes, I did.

Q. Did you know about that at or about the time you signed that agreement? A. Yes, I did, but the charter-party states one safe U. S. Gulf port. Therefore, when a definite port is not given in the charter-party we usually get definite orders from the charterers at the last minute, before the ship proceeds to that port.

[21] Q. Is your letter of April 28th to the Master, Exhibit 2, the first instructions you gave to the Master to go to Corpus Christi? A. Well, the first official instructions.

Q. It is the claim of your company, in this case, is it not, Mr. Vatis, that on April 18, a new charter was made? A. An addendum, yes.

Q. A new agreement of some kind was made on April 18? A. Yes, sir.

Q. Is it the claim of your company that Respondent's Exhibit A reflects that agreement? A. Yes, sir.

Q. Didn't that agreement contain this provision: It is understood and agreed that immediately upon discharge of molasses cargo now enroute to New Orleans, vessel to proceed to Sinclair Oil Terminal, Corpus Christi, to load under this charter."?

Is that right? A. Yes, sir.

Q. If you say that that was a binding agreement on April 18th, how does it happen that you felt the need of any instructions further as to the loading port? A. Well, it is the usual thing that the broker confirms [22] that; and we, in turn, give the sailing instructions to the Master the last minute, and not before that.

Q. But, you say that this document, Exhibit A for Identification, was a binding agreement on April 18th, do you not? A. Certainly it was.

Q. If it was, did it not constitute your agreement to send the ship to Corpus Christi? A. It certainly did.

Q. Why did you need any further instructions, if you thought that this agreement was in effect? Can you answer that? A. I didn't say we needed further instructions. I just say April 28th confirmed that we were going to Corpus Christi.

The Court: You are not offering that letter?

Mr. Underwood: Yes.

The Court: At this time?

Mr. Underwood: Yes, I offer it in evidence.

Mr. Cardillo: No objection.

(Letter refefred to above is marked Respondent's Exhibit A in evidence.)

By Mr. Underwood:

Q. That is, Mr. Vatis, you signed a libel in this [23] case, or verified the libel in this case, did you not? A. Yes.

Q. Do you remember that? A. I think so, yes.

Q. Well, I don't have the original in hand, but I have my copy.

Mr. Underwood: If Mr. Cardillo doesn't mind, I will show him my copy without marking it.

Q. This is your signature, is it not? A. Yes, sir.

Q. You didn't make this agreement of April 18th, yourself, did you? A. No, sir.

Q. You didn't have, yourself, any conversations with Coastal Oil Company that related to this conversation, did you? A. With Coastal Oil, no. We speak through a broker.

Q. I would like to read to you the first sentence, or a good part of it, of Article Fifth of this Libel which you verified:

> "Fifth: Subsequently, all negotiations were conducted between Libelant and Respondent, which resulted in the making of an oral charter-party on April 18, 1952, including the same terms and [24] conditions".

My question is directed to the date. Where did you get the information that the oral agreement was made on April 18th? A. From Mr. Winterberger, who was our broker.

Q. Did he tell you that he made that oral agreement on April 18th? A. Yes, sir.

Q. Do you remember when he told you that? A. Whether it was morning or afternoon, you mean?

Q. No, did you remember what day or date it was that he told you the agreement had been made on the 18th? A. No, I couldn't.

Mr. Underwood: I have no further questions.

Redirect Examination by Mr. Cardillo:

Q. Captain Vatis, this document, Respondent's Exhibit A, appears to have inserted in it the data which Mr. Underwood read, in different type from that which appears to be used in connection with the other matter. Do you know

whether that additional type which Mr. Underwood read, and which states that the vessel was to go to Corpus Christi, was on the document you had on April 18th? A. I am not sure. I may have been out when all this [25] happened. I am not quite sure.

Q. Was that matter in that agreement when you signed it? A. I couldn't tell you. I don't know.

Mr. Cardillo: I should like to offer this in evidence, if I may. It has been formerly identified as Respondent's Exhibit 16.

Mr. Underwood: I think you might ask the witness to give his testimony about it first rather than just offer it in evidence.

(Document referred to was marked Libelant's Exhibit 3 for Identification.)

By Mr. Cardillo:

Q. Captain Vatis, is this a copy of Respondent's Exhibit A that you hold there? A. Yes, it is.

Q. Did you sign that statement when you signed Respondent's Exhibit A? A. I suppose so, but it isn't quite the same.

Q. What is missing from this copy that appears on Respondent's Exhibit A?

The Court: What are you referring to? You have got to have something in the record. You are talking about two documents. You have only identified one.

Mr. Cardillo: They are both copies of the same [26] document.

The Court: It would mean nothing so far as the record is concerned, if you don't identify it. You are talking about Respondent's Exhibit A, and now you are referring to another document.

Are you referring to your Exhibit 3 for Identification, now?

Mr. Cardillo: Yes, I am, your Honor.

By Mr. Cardillo:

Q. Libelant's Exhibit 3 for Identification appears to be a carbon copy of Respondent's Exhibit A, both headed Addendum No. 1, and both appear to have been typed at the same time. I notice this distinction, however, in Respondent's Exhibit A, which was introduced by Mr. Underwood a few minutes ago. There appears to have been added the language which he read to you and which I will repeat: "It is understood and agreed that immediately upon discharge of molasses cargo now enroute to New Orleans, vessel to proceed to Sinclair Oil Company terminal, Corpus Christi, to load under this charter."

Was that language on the copy of this document when you executed it?

In order to refresh your recollection, I hand you a copy of Libelant's Exhibit 3 for Identification. [127] A. It appears that it wasn't.

Q. Did you execute Libelant's Exhibit 3 for Identification and Respondent's Exhibit A at the same time? A. Yes, sir.

Mr. Cardillo: I offer Libelant's Exhibit 3 for identification as an exhibit.

Mr. Underwood: No objection.

(Thereupon, the document heretofore marked Libelant's Exhibit No. 3 for Identification, was received in evidence.)

By Mr. Cardillo:

Q. Was it your opinion, Captain Vatis, that the Respondent had the right to change loading port at any time prior to 24 hours before leaving the last discharge port?

Mr. Underwood: If your Honor please, I object to his opinion.

The Court: No, I will allow it. Overruled.

A. Yes, he could have changed. The charter-party says one safe port, U. S. Gulf.

Mr. Cardillo: That is all.

The Court: That would be an amplification of the charter-party, not a contradiction to it.

Mr. Underwood: I don't quite understand your Honor's comment. Which would be an amplification:

The Court: In answer to the question that he asked, did he understand from that charter-party that it could go to any port in Texas, whether it could be changed in twenty-four hours. That was the question.

Mr. Underwood: If your Honor please, that is one of the great troubles with this case, and one of the reasons this dispute has arisen. There is not enough attention paid to the papers.

I would like to ask the witness a question on that subject.

The Court: Of course, you can.

Recross Examination by Mr. Underwood:

Mr. Underwood: Will you please read back the witness's last answer?

(The previous answer was read by the Reporter).

Q. When you say the charter-party, you refer to the charter-party of March 27th? A. Which means also the addendum.

Q. You don't find any such provision about changing the loading-port in the addendum, do you? A. The addendum just changes the dates and the rate, that [29] is all. But, it refers to the charter-party and all the conditions.

Q. Respondent's Exhibit A does say: "It is understood and agreed that immediately upon discharge of molasses cargo now enroute to New Orleans, vessel to proceed to Sinclair Oil Terminal, Corpus Christi, to load under this charter," does it not?

Mr. Cardillo: If your Honor please, there is no testimony in this case that the addendum, with that language, was ever agreed to between the parties.

The Court: He isn't asking that. He is asking whether that appears in that exhibit that he introduced in evidence.

Mr. Underwood: Yes, sir.

Mr. Cardillo: I am sorry; I will withdraw the objection.

By Mr. Underwood:

Q. That does appear in Exhibit A, does it not? A. It does.

Q. That was part of the agreement that you claim in this case, was it not? A. I don't know whether it was.

Q. You don't? A. No, sir.

[30] Q. Then you don't say that this addendum is the agreement on which you rely in this case? A. Certainly, but I don't know which is the correct one.

Mr. Underwood: I have no further questions.

Mr. Cardillo: That is all for the present.

The Court: Any further questions, Mr. Underwood?

Mr. Underwood: No, not at this time.

JOSEPH A. WINTERBERGER, called as a witness and having been first duly sworn, testified as follows:

Direct Examination by Mr. Cardillo:

Q. Mr. Winterberger, where do you reside? A. I reside at High Crest Lake, Rural Delivery, Butler, New Jersey.

Q. What position do you hold? A. I am a tanker-broker.

Q. With any particular firm? A. With the firm of Simpson, Spence & Young.

Q. Have you had considerable experience as a tanker-broker? A. I have been with the firm of Simpson, Spence & Young since April of 1947. Prior to that, I was chartering-man for the Gulf Oil Corporation in New York.

[31] Q. Prior to that, what occupation did you pursue? A. Prior to that I was with the Government during the war from October of 1941, through December of 1945, with the Petroleum Administration for War, as the Chief of the Tanker Section.

Q. Mr. Winterberger, I show you libelant's Exhibit 1, which is the charter-party of March 27, 1952, covering the vessel "Strathbay". Did you negotiate that charter-party? A. I did, sir.

Q. Did you have any conversation with anyone at Strathmore Shipping Company after the charter-party was effected? A. Yes, I would be speaking with the owners, checking our position, or discussing the progress of the vessel, or even looking for further business for her.

Q. Did you have any conversation with regard to this charter-party? A. Yes, I believe I advised Mr. Martell of the position of the ship from time to time, and on about the 8th, the owner, Captain John, approached me and advised me that the ship appeared to be slipping a bit and he would like to get a few days on the cancelling.

Q. Was that the 8th of April? A. On or about the 8th of April.

[32] The Court: You are talking about the previous witness, John Vatis?

The Witness: Yes, sir. I approached Coastal, Mr. Martell. I told him that the owner, I had advised him, I am sure, of the position of the ship on that day. I said, "It looks like she is slipping a bit. The owner wants a few days and he will agree to a concession of 20 points in the charter rate."

Well, he understood what I meant. Chet says, if I recall, and I do recall, he said, "Well, I am not interested in that at this time. Twenty points doesn't amount to very much. I am not interested."

That appeared from time to time, but from time to time I would still talk to Chet, Mr. Martell, and I asked him if there was anything new on the concession

of the three days. There wasn't anything definite that developed. I am sure that I gave him the position of the boat, gave him the market positions, what was doing in the market, what was happening, fixtures, et cetera.

By Mr. Cardillo:

Q. Just a minute. You say the first time you spoke to him was April 8, 1952? A. The first time with reference to negotiating an extension, [33] yes, sir on or about April 8th.

Q. When did you next speak to Mr. Martell about an extension? Do you have any recollection? A. It would be sometime between—definitely between the 8th and 17th. There would have been, I don't know, a couple of days later, I would have called and asked him if he hadn't given it any further consideration. There was negative reaction. There was just no reaction to it.

Q. Did you advise the owners of Mr. Martell's reaction to the offer? A. Yes.

Q. What did they instruct you? A. There was no instructions during that period. Well, he didn't want it, he didn't want it. All they were looking for was a safety factor. I feel quite confident, as I recall distinctly that it appeared that the vessel was going to make it April 30th, the cancelling date.

Q. Did the owners ever instruct you to approach Mr. Martell with any other proposal? A. The market was slipping pretty badly and from time to time I would be keeping the owners currently posted of the market, of course. Along around the 17th, it could have been the 16th, in there somewhere, the owner called me and said, "Joe, let's see if we can get a few days extension on this charter. Check with Martell again and see if he has any reaction."

But, on the 17th, he gave me firm authority—the owner gave me firm authority to arrange with Coastal Oil Company for a concession; that is, that they would extend the charter for ten days and that he would grant them a rate concession down to plus 140 per cent.

Q. Did you then approach Mr. Martell with the proposal? A. I did approach Mr. Martell.

Q. What was his reaction, if you recall? A. I believe his immediate reaction was he would think about it.

Q. Did you communicate with him again after that? A. Yes, I did. I took it up with him again and I believe it was in the second conversation along which he said, "Well, it is worth more than that. The market is slipping. I will give the owner a ten-day extension, providing he gives me a rate concession of seventy points.

In other words, the rate to be U.S.M.C., plus 120 per cent if she makes her original cancellation, and he will agree to a rate of plus 100 per cent, which would have been a concession of 90 points, if she missed that original cancelling. For that, he was agreeable to take ten day extension of the charter.

[35] Q. In order to understand this clearly: His proposal, then, as I understand it, was that he would grant an extension of ten days of the cancelling date, in consideration for a reduction of the rate from USMC, plus 190, to plus 120, if the vessel arrived by April 30th, or to plus 100, if it arrived between April 30th and May 10th; is that correct? A. That was his counter-offer to my proposal of 140, yes, sir.

Q. Did you communicate that offer to the owners? A. I did, sir.

Q. Do you recall with whom you spoke? A. Mr. A. T. Vatis.

Q. What did the owners advise you on that occasion? A. Well, to go back again: At 140, if she made the original cancelling of April 30th, and 120 if she made the May 10th cancelling.

Q. They authorized you to make that offer to Mr. Martell? A. I was authorized by A. T. Vatis.

Q. Did you communicate that to Mr. Martell? A. Yes, sir.

Q. What was his reply to that offer? A. His reply was that—no, he didn't think he would go [36] along with that. I might add one little point before I state this: The owner, in giving me the authority to fix at 140 and 120 if she made the 10th cancelling, also gave me discretion to go to 120 if she made or missed the cancelling date; that is, if she made or missed the April 30th, which was a further concession on the part of the owner.

Now, I went back to Martell, and because of my authority, without using my discretion of 140 and 120, that is what I advised Mr. Martell. Mr. Martell was still not interested at that rate. He felt it was too high, and the market was slipping, there was no question about it. But, this started getting into pretty big money. We are talking about a lot of money now.

Chet agreed to 120. I said to Chet: "Will you agree to 120?" To which he agreed, and I confirmed the business.

Q. When you say Mr. Martell agreed to 120, do you mean that he agreed to the proposal that the cancelling date be extended from April 30th to May 10th, in consideration for a reduction of the rate from plus 190 to plus 120? A. Yes, sir.

Mr. Underwood: If your Honor please, I object to the form of the question.

The Court: It isn't proper form. You can ask [37] it a different way.

Mr. Cardillo: I will withdraw the question.

By Mr. Cardillo:

Q. Do you recall exactly what Mr. Martell said to you on that occasion in making or expressing his agreement? A. Well, I don't recall exactly what he might have said. There was no discussion about it. It was an agreement. It was done. The only thing he might have said is, "We will check the position again." That, I might have done, or I might not have done. I am sorry, I don't recall.

The Court: You are talking about reducing the rate and you talked about extending the cancellation date?

The Witness: There was a consideration.

The Court: That was talked about between you and Martell?

The Witness: That is right, and between the owner.

The Court: The final agreement was what?

The Witness: The final agreement was that the rate was to be USMC T2 rate plus 120 per cent, and the cancelling date was to be May 10th.

[38] By Mr. Cardillo:

Q. Were there any reservations or any doubts in the expression of Mr. Martell's acceptance?

Mr. Underwood: I object to the form.

The Court: Yes, I think it is improper form. Were there any other conditions other than what you just testified to?

The Witness: No, sir, all other conditions, the conditions of the original charter were to apply, sir. The way that the addendum reads is that the rates shall be reduced from a USMC rate of 190 to a USMC rate of 120. The cancelling date shall be changed from April 30th to May 10th, and the rate would be demurrage and extras, which is a common occurrence in chartering, which would follow along with the original charter-party, sir.

By Mr. Cardillo:

Q. Did you then communicate with the owners of the vessel? A. I told them that she was confirmed at 120 for the ten-day extension, yes, sir.

Q. Did you then prepare an addendum to the charter-party to reflect this agreement? A. I did, sir.

[39] Q. I show you a copy of Libelant's Exhibit 3 and ask you if that is the addendum that you prepared? A. That is the original copy, or the first copy of the original, yes, sir.

The Court: You prepared that?

The Witness: I drew this up, yes, sir.

Q. After you prepared that document, Mr. Winterberger, what did you do with it? A. I sent it to the owner for signature.

Q. Do you recall how many copies were sent there? A. I believe that there were only two copies, the original and this copy for signature. There may have been a working copy. If so, it would have been stamped "copy" over the place for signature.

Q. Do you recall the date that you came to the agreement with Mr. Martell? A. April 18th.

Q. Is there any doubt in your mind about that date? A. There is absolutely no doubt whatsoever.

Q. What causes you to be so certain about it? A. That is a custom of the trade, sir, that when you conclude a negotiation, you date the document accordingly.

Mr. Underwood: If your Honor please, may I have the last three questions and answers read?

[40] The Court: Yes.

(The record was read by the Reporter, as requested).

By Mr. Cardillo:

Q. Mr. Winterberger, I show you a letter from Simpson, Spence & Young, addressed to Strathmore Shipping Company, Inc., which appears to be a covering letter, or under cover of which, that addendum was sent to the Libelants. Did you send that letter? A. That came from my office, yes, sir.

Q. Was that the letter that was sent with the addendum? A. That was attached to the addendum, I believe.

Mr. Cardillo: I offer this in evidence.

Mr. Underwood: I won't object to it.

Mr. Cardillo: It was formerly marked Respondent's Exhibit No. 15 for Identification.

(The document above referred to, formerly marked Respondent's Exhibit No. 15, was received in evidence and marked Libelant's Exhibit 4.)

The Court: We will take a five-minute recess.

(Short recess.)

By Mr. Cardillo:

Q. I believe you testified, Mr. Winterberger, that you sent the addendum, of which Libelant's Exhibit 3 is [41] a copy, to the Libelant, with a covering letter of April 18, 1952. I show you both of those copies. Were those the addenda that you sent to the Libelant, returned to you in due course? A. Yes, sir, they were returned the same day. Their office is just under ours. I believe it was just a question of the girl coming down. It could well have been that John came down. Possibly my girl went to his office, he signed it and brought it back.

Q. Were they signed when they were returned to you? A. Yes, sir.

Q. What did you then do with them, Mr. Winterberger? A. I then instructed my girl to forward the document to the charterer for signature.

Q. Did you send the letter? Was a letter sent to the Respondent? A. Yes, the usual covering letter.

Q. I show you a copy of the letter dated April 19th, addressed to the Coastal Oil Company, the Respondent in this case, and ask you if that is the cover-letter, or a copy of the cover-letter with which you sent the addenda to the Respondent? A. Yes, sir.

Mr. Cardillo: Mr. Underwood, do you have the [42] original of this letter of April 19th?

(Mr. Underwood handed paper to Mr. Cardillo.)

I offer this.

(Document above referred to was marked Libelant's Exhibit 5 in evidence.)

Q. Did you ever receive a return from the Respondent of the addenda signed by Mr. Martell, or anyone at Respondent's office? A. No, sir.

Q. When did you next communicate with the Respondent? When was your next conversation with Mr. Martell? A. Well, I may have spoken with Mr. Martell in the interim.

Q. Just a minute. When you refer to the "interim", just what do you mean? Your covering letter was sent April 19th, was it not? A. Yes. I would like to think for a moment, if I may. I believe Tuesday—the next time that I spoke was on the 21st, I believe. I would say the 21st.

Q. That would have been on Monday, if April 19, 1952, was a Friday?

Mr. Cardillo: Would Mr. Underwood so stipulate?

Mr. Underwood: April 19th, according to Mr. Winterberger, is Friday. The 19th was Saturday.

The Court: The 18th was Friday; the 19th was [43] Saturday.

The Witness: That would have been on Monday, the 21st.

Q. Monday, the 21st? A. Yes, sir.

Q. Did you telephone Mr. Martell, or did he telephone you? A. I believe Mr. Martell telephoned me.

Q. What did he say to you? A. He appeared to be very concerned—

Mr. Underwood: If your Honor please—

The Court: That may go out. You can report the conversation, but don't say how he was concerned.

A. Mr. Martell advised me that he had heard in the market that the vessel was fixed for a cargo of molasses to report prior—she was fixed for the period prior to reporting on

this charter-party. I advised Mr. Martell that if that were the case, I would surely know about it.

However, I would check with the owner, which I did. Mr. Martell stated that he was not going to sign the addendum because the owner—he felt that the owner had misrepresented the position of the vessel from the time of fixing, which dated back to March 27th. I assured him that that was not the case, that I had kept him currently [44] posted on all positions, as the owner had given them to me. I said, however, "If you wish, why don't you call the owner?" I believe that I gave him the owner's telephone number and he called the owner. I did give him the owner's telephone number.

Q. Is it a corrget statement of Mr. Martell's comment—

Mr. Underwood: If your Honor pleases, I am going to object to the form of this question right now. I think that this is an intelligent witness. He can give his own version.

The Court: Yes.

Mr. Cardillo: Withdrawn.

By Mr. Cardillo:

Q. Did you then communicate with the owners? A. I had a conversation with the owner. I believe the owner called me and stated—

Mr. Underwood: If your Honor pleases, I dislike to object all the time, but the question was only whether he had a conversation. I don't think the conversation between Mr. Winterberger and the Libelant, in this case, is binding upon the Respondent.

The Court: It might be of some help to the [45] Court. The answer to the question: Did you have a conversation with the owners, is yes or no.

The Witness: Yes.

The Court: What is your next question?

By Mr. Cardillo:

Q. What did you say to the owner?

Mr. Underwood: In view of what your Honor has said, I shan't henceforth object to questions of this type.

The Court: Of course, it can't be binding except it might be of some help to the court in determining what the facts and what the situation is.

Mr. Underwood: I am delighted to have the entire background in.

The Court: All right, go ahead.

By Mr. Cardillo:

Q. What did You then advise the owner? A. My conversation with the owner?

Q. Yes. A. The owner advised me that he had spoken with Martell and that Martell had advised him that he had heard that the vessel had been fixed for an interim voyage, and that she would not report at the loading port until May 9th, and that if she did not report by May 6th, that Sinclair would [46] not hold the cargo.

I said, "Well, did you give them the position of the boat?" He said, "Yes." He said, "I have the log right here." I said, "Well, let's give him the log."

I gave him the information which the owner had given me about excerpts from the log, showing the delay, the delays, that had occurred since March 27th, from the date of the original fixing.

Q. Did the owner give you that information? A. He gave me that over the telephone. It was at that time that I suggested that he give me the log of the ship and that I would pass it along to Mr. Martell, if he wanted it. I did.

Q. Did you then call Mr. Martell? A. I then called Mr. Martell and gave him the log of the vessel, as the owner had given it to me.

Q. Exactly what do you mean by "an interim voyage", Mr. Winterberger? A. The implication was, sir, that she

was to report on this charter with convenient dispatch, with a sufficient time; it was conceivable, that she could have made a short voyage before reporting on the Coastal charter.

Q. That is prior to May 10th? A. Yes, prior to May 10th, certainly, before reporting [47] on the Coastal charter, as it was defined on March 27th, with the ten-day extension, of course.

Q. When you gave that information to Mr. Martell, what did he then say to you? A. Well, I believe that that was the end of the conversation on that day. It was the following day, on the 22nd, that I again had a conversation with Mr. Martell.

Q. That was May 22nd? A. No, April 22nd.

Q. What was that conversation about? A. Well, Mr. Martell—(to the Court) I am trying to remember what you told me not to say—Mr. Martell—

The Court: What did he say to you?

A. He said that he didn't remember agreeing to an extension for as many as ten days. But, regardless, he wanted a clause in the charter to the effect that she was to proceed on his charter immediately upon completion of her current voyage.

Q. What did you reply to him? A. My reply to him was that I saw no objection to it, but that I would call the owner.

Q. Did you then call the owner. A. I then called the owner.

Q. What did they say? [48] A. The owner had no objection.

Q. Did you so advise Mr. Martell? A. I advised Mr. Martell that if he felt it was necesary to have such a clause in the addendum, go ahead and write it in.

The Court: What was that clause? If he wanted the boat to proceed—

The Witness: He wanted the boat to proceed on this charter immediately Upon completion of the cur-

rent voyage, which I believe, if I recall correctly, was molasses, which she was discharging at New Orleans. He seemed to have some concern about her having been fixed for an intermediate voyage.

The Court: You told him to insert that in the addendum?

The Witness: That is correct, yes, sir.

The Court: Proceed.

By Mr. Cardillo:

Q. Did you agree with him on any language for insertion in the addendum? A. At that time, no, sir.

Q. Did you hear from him or from his office again that day? [49] A. Later his girl called and requested that I dictate such a clause for insertion.

Q. Did you dictate such a clause to her? A. I did.

Q. I show you Respondent's Exhibit A and call your attention particularly to the sentence commencing "It is understood and agreed". Do you recall whether that is the language which you dictated to Mr. Martell's secretary? A. I would say it is, yes, sir. I have No copy of it. I just dictated it over the telephone. It is not a very complicated thing.

Q. Did you have further conversation with Mr. Martell on that day? A. I don't recall, sir.

Q. When did you next have a conversation with Mr. Martell? A. The next conversation with Mr. Martell was on the 29th, which I believe was a Tuesday. Was that a Tuesday?

The Court: If the 21st was a Monday, it would have to be.

Q. Was that with regard to the charter in dispute in this case? A. No, that wasn't with respect to the charter. I arrived [50] in the office late In the afternoon and I checked with the owner. There was a note on my desk to the effect that Martell had called and he advised that the vessel was still to load at Sinclair, Corpus Christi.

Q. That was in connection, then, with the voyage in question, was it not? A. That is right.

Q. Did you have any conversation with Mr. Martell regarding any other voyage on April 22nd? A. On April 22nd, I negotiated with him on another voyage, on a continuation, for an additional voyage in continuation of this charter. After this voyage, then I negotiated a charter for the performance of another voyage.

Q. Of this same vessel? A. Of that same vessel, yes, sir.

Q. For the same charterer? A. For the same charterer.

Q. Do you recall the terms of that negotiation?

Mr. Underwood: If your Honor please, I don't see that this other charter which never was made, has any bearing on this case.

The Court: I don't see what the materiality of the terms have.

[52] Mr. Cardillo: Except, your Honor, that that negotiation would reflect the extension of the cancelling date.

The Court: What is the first statement you made?

Mr. Cardillo: I say the lay-days in the negotiations that Mr. Winterberger had with Mr. Martell, the lay-days under the charter-party were—

The Court: I will allow it. I will overrule your objection.

Q. Do you recall the terms of the negotiations, Mr. Winterberger? A. The terms of the negotiation were the same as the voyage that we ultimately fixed and that is the rate to be former USMC T-2 rate, plus 50. The lay-days to be May 17, May 31, cancelling, and the expected readiness to be May 18-19.

Q. Do you know how long the voyage of the "Strathbay" would have taken, in point of time, if she had served under the charter-party under dispute? A. Yes.

Mr. Underwood: You Honor, that is pretty speculative. I think that is objectionable. There was a strike pending.

[53] The Court: I will let him say, in the ordinary conditions, how long it would take. I will let him answer.

Mr. Underwood: Very well, I have no objection to an ordinary voyage.

A. The normal time required for a round-trip voyage from Corpus Christi, to Port Newark—if that is the voyage she was to make, or from a Gulf port to a port in New York, and back to the Gulf, would require eighteen to nineteen days with normal dispatch on that particular vessel.

Q. Did you, in fact, negotiate that charter with Mr. Martell? A. I negotiated it, yes, sir.

Q. Did you conclude such charter? A. I did not conclude it. I also negotiated with Mr. Marron, Mr. Robert Marron, I believe.

My negotiations were for this charter, the second charter with Coastal. I believe, if I recall correctly, it started with Mr. Martell on the 23rd of April. There were conditions, there were circumstances that make it very vivid. My negotiations concluded with Mr. Marron on April 24th. Negotiations were not successful as far as Coastal was concerned.

[54] Q. When was your next conversation with Mr. Martell in respect of the voyage under the charter-party now in dispute. A. I think I would have given him the position of the boat after that. Specifically, however, on Tuesday, the 29th, which is the point that I was getting to a moment ago, I returned to the office late in the afternoon. There was a note on my desk that Mr. Martell had called and advised that the vessel was still to load at Sinclair, Corpus Christi.

As is my custom, I immediately called the owner, I had been out of touch with him for a day or two, and asked him what was her position. He told me what her position was. He said, "She looks like she is going to be the 1st or 2nd." This I immediately conveyed to Mr. Martell. That was on

the 29th, to the best of my knowledge and belief. I am quite sure it was on the 29th.

Q. Do you know who left that message for you? A. Yes, James Patton, who sits across from my desk.

Q. When did you next discuss this matter with Mr. Martell; do you recall? A. I believe that the next discussion with Mr. Martell was that Mr. Martell called me early the following morning and he advised me that if the vessel did not arrive at [55] Sinclair, Corpus Christi by 2400 on the 1st,—he may have used midnight, but I recall 2400 specifically—on the 1st, that the plant would be struck.

Q. What did you reply to him? A. If I recall, sir, I suggested this is broker talk—"Why don't you try to get a cargo at Aruba?" or that possibly, if he wished, I would try to prevail upon Pure Oil to advance the lay-days.

Q. You referred to Pure Oil to advance lay-days. Was that in reference to any other charter on which the "Strathbay" had to serve? A. Yes, they were the circumstances why Coastal were not successful in chartering the boat on April 24th.

Mr. Underwood: If your Honor please, I move to strike that out.

The Court: Yes, I can't see that. I won't allow that. Strike it out.

By Mr. Cardillo:

Q. Was the "Strathbay" engaged to Serve Pure Oil, Mr. Winterberger? A. The "Strathbay" was chartered to Pure Oil for a voyage, for two voyages. Well, we negotiated two voyages with Pure Oil. The first voyage was to load in the Gulf, for Tampa, the second voyage they preferred that the vessel [56] be chartered to the City of Jacksonville, and the second voyage was to load in the Gulf for Jacksonville.

Q. Did you negotiate those charters? A. I negotiated those charters. The lay-days for it—in the original nego-

tiation, as I stated, was 17th-31st when Pure Oil referred the two charters, we adjusted lay-day to take care of the two charters.

Q. When was your next conversation with Mr. Martell; do you recall? A. On May 1st, Mr. Martell called me and he said to advise the owners that the "Strathbay" charter was cancelled.

Q. What did you say to him at that time? A. I told him that he had an agreement.

Q. Did he make any reply? A. He said that the owner misrepresented the vessel from the time of fixing.

Q. Did he deny the agreement? A. He never denied making the agreement.

Q. What did you then do, Mr. Winterberger? A. I advised the owner.

Q. Did they give you any instructions? A. They told me to call him back and tell him that they would not accept the cancellation in view of the [57] addendum extending the cancellation to ten days. He also told me to send a telegram.

Q. Did you send a telegram? A. I did, sir.

Q. I show you a copy of a telegram dated May 1st, addressed to Coastal Oil Company, from Simpson, Spence & Young and ask you if that is a copy of the telegram that you sent to Coastal Oil Company? A. Yes, I would say that is it.

Mr. Cardillo: Mr. Underwood, do you have the original of this telegram?

Mr. Underwood: Yes, I have the original of the telegram, here, which has a stamp on its face, "Duplicate of telephone-telegram."

Apparently, it was telephoned and later delivered in that form.

Mr. Cardillo: I should like to offer this in evidence, your Honor.

Mr. Underwood: No objection.

(Telegram referred to above is marked Libelant's Exhibit 6 and received in evidence.)

Q. Did you have any further communication with Mr. Martelli after May 1st? A. I may have advised him that the vessel had tendered. [58] I believe I did.

Q. Do you recall when you gave that advice? A. It was probably on Monday. If I recall correctly, the vessel had arrived 1800 on the 3rd, which I believe was over a weekend, and I advised him on Monday morning. I believe he was advised by telegram, if I recall correctly.

Q. Mr. Winterberger, you kept a memorandum book or diary of some kind during this period, did you not? A. Yes, sir.

Q. Do you have that with you? A. Yes, sir. It is in the bag at the end of the table there.

Mr. Underwood: May the record show that the table indicated by the witness is the counsel table and that his testimony thus far has been given without reference to the diary.

The Court: Yes.

Q. Glancing through this book, Mr. Winterberger, I notice various entries containing annotations of matters to which you have testified. Did you examine this book prior to your testimony today? A. Yes, sir.

Q. Did you make the entries in this book yourself? [59] A. Yes, sir.

Q. Were they made at the time of the occurrences to which they refer? A. Not necessarily, sir.

Q. How long after would they have been made?

Mr. Underwood: I object to the form.

The Court: I sustain the objection. What are you trying to do; get that book in evidence?

Mr. Cardillo: No, your Honor.

I have no further questions of Mr. Winterberger at this time.

Cross-Examination by Mr. Underwood:

Q. Mr. Winterberger, you did have notice from Coastal on May 1st of cancellation, did you not? A. Yes, sir.

Q. At that time the vessel had not arrived at the designated loading port, had she? A. That is true, sir.

Q. You know that this case then turns entirely upon whether or not there was an oral agreement between you and Mr. Martell for an extension of time, do you not? A. If that is what you say, sir, yes.

Q. You know that, don't you? [60] A. My contention is that there was an agreement.

Q. You know the whole case turns upon that, don't you? A. No, I don't know.

Q. You have had many conversations with Mr. Cardillo about this case, haven't you? A. I have had some conversation with Mr. Cardillo, yes.

Q. You know that there is a dispute as to whether or not an oral agreement was made, don't you? A. The first time, sir, that I ever heard that Martell denied having made this agreement was the morning that I sat with you, giving testimony.

Q. You know now that there is that issue, don't you? A. Yes, there is an issue.

Q. We will come to the question of when you first learned it, in due course. Your reputation as a broker, for accuracy, is then, therefore, involved, is it not? A. Not necessarily, sir, no.

Q. You do a great deal of brokerage business, do you? A. I have, yes, sir.

Q. A lot of it by telephone? A. Yes, sir.

Q. Practically all of it by telephone? [61] A. No, sir.

Q. More than half of it by telephone? A. It depends. I don't know. I couldn't say, sir. I fixed a lot of vessels on cables. I fixed them by telephone.

Q. Is it important for you to have a reputation in the field for accuracy in recording and representing telephone conversations? A. I think I have such a reputation, yes, sir.

Q. It is important to you to have one, isn't it? A. Yes, it is important to anyone to have a good reputation.

Q. You know that that reputation is at stake in this case, don't you? A. No, I don't.

Q. How many fixtures do you make a year for Strathmore? A. I haven't made a fixture with them since they sold the boat.

Q. At the time of these events here in question, four years ago, was Strathmore one of your frequent clients? A. I fixed their vessel on occasion, yes.

Q. Quite regularly? A. Not always. I was not an exclusive broker.

[62] Q. They were a good customer of Simpson, Spence & Young? A. They are a client, yes.

Q. Simpson, Spence & Young, makes commissions on the fixtures, do they not? A. That is the way we make our living.

Q. You share in those commissions? A. Yes.

Q. Hence, you have a financial interest in the outcome of this case, don't you? A. I don't know if I do. I do not make the commission policies, sir. We collect commissions on freights earned, to the best of my knowledge.

Q. If the court ultimately holds that these freights were earned, you will share in those earnings by a fraction of Simpson, Spence & Young's commission, wouldn't you? A. I don't know whether Simpson, Spence & Young claim a commission.

Q. Ordinarily, in the ordinary course, you do have such a share? A. I don't know a thing about court-procedure, what happens when a case goes to court, because I have never been involved before, sir. This is like blood-money to me, as far as I can see.

[63] Q. In the ordinary course, you do have such a share in the commissions, don't you? A. When a vessel makes a voyage and the freight is paid, we collect commissions.

Q. You, yourself, personally, get a share of that? A. I myself, personally, get a share.

Joseph J. Winterberger—for Libelant—Cross

Q. You knew these Strathmore people pretty well? A. Yes, I knew them quite well.

Q. Did you ever serve as a director of this company? A. No, sir.

Q. Were you invited to serve as a director of the company? A. Yes, sir.

Q. How many people in the Simpson, Spence & Young staff were serving as directors for the Strathmore Company, do you know? A. I don't know. I believe that possibly my superiors were.

Q. Who is that? A. Mr. Augenthaler.

Q. He was a director of this company? A. I believe he was a director, yes, sir.

Q. You know that the man who sat across the desk from you, Mr. Patton, was at one time a director, don't you? [64] A. I believe he was.

Q. It is fair to say, then, that Simpson, Spence & Young, your company, were quite interested in Strathmore?

Mr. Cardillo: I object to that.

A. Our company had no financial interest in Strathmore.

The Court: Wait a minute. What is your objection?

Mr. Cardillo: I object to that, your Honor: It calls for a conclusion, for the operation of this man's mind. I don't think he is qualified to state what is fair and what would be unfair.

The Court: There is nothing in the record up to now except that he is a director.

The Witness: I am not a director, sir.

The Court: These other two people. There is nothing about stockholders.

Mr. Underwood: I shan't pursue it.

By Mr. Underwood:

Q. In the course of your testimony this morning, Mr. Winterberger, you have mentioned a number of dates, some with quite a good deal of accuracy, it would appear. A. Yes, sir.

Q. Have you refreshed your recollection while you were testifying, from memoranda? [65] A. While I was testifying?

Q. Yes. A. No, the only thing I have are these things in front of me.

Q. Why didn't you produce your diary when you were testifying this morning? A. I wasn't asked to, sir.

Q. Was there any conversation about that before you came to Court today? A. Never, sir.

Q. When to produce your diary? A. That diary hasn't been out of my hands since the day that I left you. And I wouldn't give it to you for that reason.

Mr. Underwood: May I have the diary, please? Will you mark that for identification, please.

(Diary referred to above is marked Respondent's Exhibit B for Identification.)

By Mr. Underwood:

Q. Mr. Winterberger, I hand you Respondent's Exhibit B for Identification. I think Mr. Cardillo asked you whether you made all the entries in that diary. Did you answer such a question in the affirmative? A. I believe I did, yes. [66] Q. You made all the entries in that book? A. To the best of my knowledge and belief, all the entries in this book are mine, unless you made one when you put the exhibit on the thing. You did do that, I am sure. Yes, you put that entry in there.

Q. Will you show me? A. (Witness complies).

Mr. Underwood: The witness refers to the first page inside the cover where the reporter has written In his

own hieroglyphics, "Respondent's Exhibit 20 for Identification, November 4, 1955."

The Witness: Somebody put something in there.

Q. In response to Mr. Cardillo's question, I think you said that all the entries were not necessarily made on the same day as the events they purport to record; is that correct? A. That is true, sir.

Q. The mere fact, then, that you have, on a particular day, an entry, doesn't necessarily mean that the event that entry concerns, occurred on that day? A. That is true, sir.

Q. Is that also true of the erasures you made in your diary? A. The erasures, I may have made erasures on that day. [67] I wouldn't say. Would you repeat your question, please, sir?

(Pending question read to witness.)

A. They may not have been made on the day erasures appear either.

Q. The substituted entries following the erasures, may well have been written on subsequent days. A. They were written to clarify anything that was in the book, sir.

Mr. Underwood: Read back the question, please.

(Pending question read to witness.)

Q. You mean days other than the day on which it occurred, do you not?

Q. Other than on which the entry was made originally. A. It could be, yes.

Q. I think you will find in your diary a number of red pencil marks. Would you look through the entries for April— A. I can visualize them.

Q. You have them well in mind, do you? A. Yes.

Q. Can you tell me when those were made? A. I have been trying to think of when those were made. I believe they were made about the time when I recei. [68] your illegal subpoenaes, can I say, when I was told that I had to appear

before you and I thought, "Well, Gee, I better get caught up on this thing so I will mark it, mark all the items that deal with Strathmore."

Q. You say my "illegal subpoenaes"?

Mr. Cardillo: I consent that that comment be stricken from the record. I don't think Mr. Winterberger is qualified—

The Court: You just answer questions.

Q. I would like to pursue that just a little bit. Has somebody told you that the subpoena to which you refer, was illegal, or is that something that you have generated from your own consciousness?

Mr. Cardillo: I object to that, your Honor.

The Court: When you hear counsel object, don't make an answer. What is your objection?

Mr. Cardillo: I object. It is wholly irrelevant and immaterial to the issues in this case.

The Court: I will allow it. It is cross-examination. Go ahead.

Q. Would you like the question read, Mr. Winterberger? A. Yes.

(Question referred to was read by the reporter).

A. No one told me it was illegal. I believe it was a [69] question of it not being in order, or something.

Q. Your present recollection is that you made those red arrows when you learned you were to appear and give your deposition in this case? A. That is, to the best of my knowledge, sir, when I made those red lines. As you notice, they only appear where "Strathbay" appears, or things in these negotiations.

Q. You gave your deposition on November 4, 1955, did you not? A. If that is the day you say, that is the day I gave it.

Mr. Underwood: Can we agree on that, Mr. Cardillo?

Mr. Cardillo: Yes, we can, sure.

Q. Will you turn to the page in your diary for the 21st and 22nd of April? A. Yes, sir.

Q. There are two pen and ink arrows there? A. There are.

Q. Do you remember when you made those? A. I don't remember when I made those, either, sir. But, I am quite sure now that they were made to clarify the sequence of events.

Q. Did you make those at the same time you made the [70] red arrows? A. I don't believe so.

Q. You think you made them some other time? A. I think I made them some other ime after studying the book.

Q. What other occasion was there for you to clarify the issue? A. I have only attempted to give the facts in this case. I have studied this thing and tried to think it backward and forward. Every way I know how to give you the answers you want. That is the reason these marks are in here.

Mr. Underwood: If Your Honor please, I move to strike out.

The Court: I can't say it is responsive. Strike it out.

A. Well, while I am studying the book and recalling the events—

Q. You mentioned one occasion when it seemed necessary to you to refresh your recollection, and that was just prior to giving your deposition. I am asking you now on what other occasion you found it necessary or desirable to do so? A. I had several days, sir, before my deposition. It could have been one day, the following day, it could have [71] been in the morning and the ink-mark put in in the afternoon. I don't recall, sir.

Q. Are you now telling us that you made those ink-marks in connection with your deposition, or preparing for your deposition? A. Prior to, yes, sir. In order to bring out these things that were relevant to this case.

Q. Within a few days before? A. I believe so, sir. I don't recall exactly, but I believe that that is when it was done.

Q. Do you remember that when you gave your deposition, I asked you about the two arrows on these pages and you said you did not ther remember when you made them? A. That is right, sir.

Q. You prepared for your deposition two or three days before the deposition, but when you gave your deposition, you couldn't remember when you made them? A. That is right. They weren't important. I am a doodler, also, if that is of interest to you.

Q. Do you say that you made all those marks, or arrows, on your own initiative, not on anyone's suggestion? A. Absolutely.

Q. You did one time see Mr. Healey, who represented Strathmore Shipping Company, Inc., in connection with this [72] case, did you not? A. Yes, sir.

Q. That was on May 6th, was it not? A. I believe that was the date, yes, sir.

Q. You have a diary entry for that, have you not? A. I do, sir.

Q. Is it not a fact that you marked this diary at that time and made the changes and erasures and interlineations at that time? A. No, sir.

Q. Will you look at the diary-page for April 17th? A. Yes, sir.

Q. Will you note there, on the seventh line from the top of the page, there has been an erasure in the word "Coastal" and "Chet," have been written? A. Yes, sir.

Q. Could you now say when you made those changes? A. Can I now say?

Q. When you made those changes? A. Yes, when I was reading over this book, sir. I don't know exactly when it was done, no.

Q. Was that in connection with your deposition, or on some prior occasion? A. It could have been on a prior occasion sir.

[73] Q. Do you know, Mr. Winterberger? A. Not definitely, no.

Q. Do you remember testifying in your deposition that you made the erasure and wrote "Coastal" after this thing began to get a little sticky? A. That is right.

Q. What did you mean by "sticky"? A. I meant that Mr. Martell, on the 22nd, said that he was not going to sign the addendum.

Q. After the dispute had arisen? A. There was no dispute, sir. What was the dispute?

Q. There was no dispute? A. No.

Q. You still say that you didn't learn until the day you gave your deposition that Martell denied agreeing to an extension? A. Repeat that, please.

(Pending question read to the witness by the reporter.)

A. That was the first time, sir, that I learned that Mr. Martell denied agreeing to an extension of ten days.

Q. You mean you knew before that that he denied making any extension at all; is that right? A. I answered your question, sir, that it was on the day [74] of the deposition, the day that I spoke with you and you asked me the question, I told you that until that morning I had not known. Because Mr. Cardillo told me that Mr. Martell denied making the extension for ten days.

Q. You knew before that that he denied making any extension at all, didn't you? A. I knew before that—I did not. Up until that time, sir, his only contention was that the vessel—that the owner had misrepresented the position of the vessel.

Q. When you went to Mr. Healey's office to discuss this case, were you not then told that the charterer denied making any extension? A. Was I not told that he denied making any extension?

Q. Yes. A. I don't believe so. I never heard it. The only thing that I heard when I went to Mr. Healey's office—and before that Mr. Martell told me he was cancelling the charter-party—he never denied making the extension.

Q. You do recall a conversation on the telephone with me a couple of weeks ago about the diary, don't you? A. Yes, sir.

Q. I asked you if I might borrow the diary? A. Yes, sir.

Q. I told you that Mr. Cardillo had told me he had [75] no objection? A. Yes, sir.

Q. You told me that I could send over for it? A. Yes sir.

Q. You called me back the same day and told me you changed your mind? A. Yes, sir.

Q. Do you recall that four or five days later I called you again and made the same request? A. Yes, sir.

Q. Do you recall that I told you again that Mr. Cardillo had no objection to my having it? A. Yes, sir.

Q. Do you recall that I told you why I wanted it? A. Yes, sir.

Q. What did I tell you? A. You told me that you wished to have an expert examine the book with respect to the writings, that I had made a number of erasures, and that you wanted an expert to look at them. To that I said, sir, "If you wish an expert to look at this book, I am only too happy that you bring him over to my office," to which you replied, "I am sorry, he has too much equipment and he cannot bring it over to your office."

[76] Q. Do you recall then that you refused to let me have the diary? A. I refused to let you have the diary? I didn't. I refused to permit you to take the diary out of my office.

Q. You knew, of course, that Mr. Cardillo had photostatic copies of all the pertinent pages? A. I knew you had them, also.

Mr. Underwood: If your Honor please, I would like to have this diary—I think it is of some importance in this case—examined by an expert whose office is not very far from the courthouse, to see if he can't bring out some of the matter that was erased. I ask your permission to take it from the courthouse for that purpose.

The Court: I don't see how I can do that at this stage of the proceeding. Is it your contention that this stuff taken out of this diary by this witness was done deliberately and some new matter written in?

Mr. Underwood: There has obviously been some significant erasing. The significance of it I cannot be certain of in all cases, because I just can't tell from the photostatic copy, which I have, what was written originally. I am sure I could tell [77] from the diary itself.

The Court: I am not going to direct that that be done. I assume you have in mind a process of rubbing something on it and it brings out any erasures.

Mr. Underwood: I do not have in mind any process that would affect the diary.

The Court: I have had that. That is as old as the hills. I used that when I was Assistant U. S. Attorney, back in 1953.

If you had such an idea in mind, you had plenty of time to make the proper application at the proper place, the Motion Part. You bring it up in the trial. If we stop this trial, it would tie me up for a couple of days while that would be done. I think it is too late and not proper at this time.

Mr. Underwood: If your Honor please, I couldn't obtain this by any discovery proceeding for the reason that this diary is not in the possession of any party in this case. Hence, it seems to me that the court was powerless to grant me possession of the document by discovery.

The Court: I don't know, but you didn't try.

Mr. Underwood: I considered it and my law may [78] be wrong. I think I am right. Furthermore, I do not expect to delay the trial by this procedure. I have in mind asking leave to take this, at the close of court today, and have my man examine it during the evening and have it brought back in the courtroom tomorrow morning.

The Court: Well, you go and proceed with your examination. I will tell you how I feel about it right now. If I change, I will let you know over the noon recess. I don't think you are entitled to it.

By Mr. Underwood:

Q. Mr. Winterberger, will you turn to your diary for April 8th, please. A. (Witness complies).

Q. When did you write the entry there with relation to the "Strathbay"? A. I don't know, sir.

Q. Will you look at the page for April 10th? Did you write originally on the page for April 10th and then strike out substantially what now appears on the page for April 8th? A. Yes.

Q. When did you do that? [79] A. I don't know, sir. It might have been the 12th, it might have been the 14th, it might have been the 11th.

Q. Did you do that after this matter began to get a little sticky? A. I might have, yes, sir. And when it was fresh in my mind and I could have recalled it.

Q. Will you please turn to the page for April 16th? A. (Witness complies).

Q. Do you see there that there have been some erasures on that page? A. Yes, sir. I have been trying to read them for you.

Q. Can you see the name of Vatis in there? A. I can, sir.

Q. Can you read anything more than the name "Vatis"? A. I have been studying this very hard, sir, and I think

I know what is written here: "Vatis concedes 20 points for—" May I go over to the window a moment, sir?

The Court: Go ahead.

A. "Vatis agrees concedes twenty points for three day extension. Still feels will make cancelling."

Q. Does that appear anywhere else in your diary? A. I don't believe so.

Q. When did you make that erasure? A. I don't recall, sir.

[80] Q. Why did you make it? A. Because it is substantially elsewhere. The information is substantially elsewhere. It is right here on April 9th, when John suggests 20 points for three-day extension.

Q. When did you makes these changes in the diary, Mr. Winterberger? A. I made them, sir, I would say, early May or the end of April of 1952, when these negotiations were fresh in my mind.

Q. You have just said that you erased the material on April 16th because the substance of it appears on April 10th? A. It appears on April 10th and on April 8th. I crossed out what it says on the 10th and I come back to the 8th. Apparently, I felt, instead of it having occurred on the 10th, it occurred on the 8th.

Q. Did it occur once or more than once? A. This is the list of events—

Q. Did it occur once or more than once? A. That is the same notation, sir, transferred from page to page.

Q. You quite freely attempted at some time to reconstruct what had happened, did you, by moving things around from date to date? [81] A. I, to the best of my knowledge, tried to put this information in chronological order and tried to pinpoint it to the day on which it happened.

Q. Now, you say you did that in early May, in 1952? A. No; that could have been—

Q. Is that what you said just a minute ago? A. That is what I said, yes. I will also say that it may have occurred in April.

Q. And a half hour ago, did you not say to me that you made at least some of these changes just before you gave your deposition? A. I said no such thing.

Q. What changes did you say you made before you began your deposition? A. I made no changes before I made my deposition. I told you that I may have changed this thing with lines, to bring out the paragraphs that were pertinent to this negotiation, or to this situation.

Q. You say that the marks and the changes were not made at the same time? A. There were notations made in this book at that time? No sir.

Q. Do you remember how many conversations you had with Mr. Martell on the 17th of April? [82] A. Do you want me to look at this?

Q. You may look at it if you need to. A. On the 17th of April, I believe there were two conversations, sir.

Q. On your deposition, you said there were three, did you not? A. Could be, yes.

Q. Do you remember, Mr. Winterberger? A. I remember the negotiations quite distinctly, sir, and the chronological order of this.

Q. Do you remember whether there were two or three? A. No, sir, not specifically.

Q. What was the substance of the first conversation that you say you had with Mr. Martell on the 17th of April? A. The substance of the first conversation with Mr. Martell was that the owner had instructed me, or had authorized me to offer him to reduce the rate to 140 per cent for an extension of ten days in the cancelling date.

Q. And is that all? A. Will you repeat your question?

Q. I asked you for the substance of the conversation. Was there any more to it?

Mr. Cardillo: If your Honor please, pinpoint [83] the conversation.

The Court: April 17th, the first conversation April 17th.

Mr. Cardillo: Thank you.

At 140 for an extension of ten days, and as I stated previously, I believe it was when Mr. Margoll stated the market was dropping, he said, "I think it is worth more than that."

Q. Are you confident that that conversation occurred on April 17th? A. I am confident, sir. That conversation could have been on the 16th, it could have been on the 15th, but is prior to my notes on the 18th, which says, "draw addendum, Strathbay". That is what I was interested in. The facts in chronological order of them. I was not interested in the date when they occurred at that time. That wasn't important to me. It was the chronological order.

Q. At that time, was it important for you to get the chronological order straightened out? A. Only when the charter, on May 1st, was the first time that it became—May 1st of 1952, was the first time that I felt that it was important to try to find out, to get this thing pinpointed on dates, rather than trying [84] to just put it in chronological order.

Q. Will you look at the page for April 17th? A. I am looking at it, sir.

Q. You see the entry of "Strathbay suggested 140 centum, ten days"? A. I do, sir.

Q. Is that the entry that you made with regard to this first conversation? A. That is the sequence of events, sir. That was the way the negotiation started after we had finished with the possibility of the three-day extension and the 170 per cent rate.

Q. Does that entry reflect what you now say you said in that first conversation? A. That entry does, in essence, reflect what I said.

Q. Will you look at the page for the following day, April 18th? Do you see that the words "Strathbay suggested" have been written in and erased? A. Yes, sir.

Q. Do you know when that was done? A. That was probably done, sir, sometime after the 22nd of April.

Q. Then, if that was erased after the 22nd of April, the whole entry on the page for the 17th was made [85] after the 22nd of April, was it not? A. Conceivably.

Q. After the matter got "sticky"; is that right? A. After the matter got "sticky".

(Whereupon, at 1:00 o'clock, p. m., the Court was recessed for luncheon.)

AFTERNOON SESSION.

2:00 p. m.

JOSEPH A. WINTERBERGER, was recalled as a witness and testified further as follows:

Cross-Examination (Continued) by Mr. Underwood:

Q. Mr. Winterberger, you have your diary before you? A. I do, sir.

Q. I think, before the luncheon recess I had asked you about erasure of an entry on the page for April 18th and the substitution of the entry on the page for April 17th. A. Yes, sir.

Q. You told me, if I recall correctly, when this matter began to get "sticky", you went through your diary and tried to put it in proper chronological order. A. And I said I may have made notes, also.

Q. You may have made a few entries besides? A. Yes.

Q. Your purpose, you say, was to make the diary reflect everything that happened on this transaction? A. Was to make the diary factual, yes.

[87] Q. The true reflection of everything that happened? A. To the best of my knowledge and belief, yes, as well as I could recall at that time, yes, sir.

Q. By the way, if I recall correctly, on direct examination this morning, you told Mr. Cardillo in response to Mr. Cardillo's question, you said that this agreement of Mr. Martell's to an extension was definitely made on the 18th; so you recall that? A. It was finalized on the 18th, yes, sir.

Q. Do you recall saying this morning that the conversation was on the 18th? A. There would have been a conversation, sir, if it was finalized on the 18th.

Q. You say that there was a conversation in which you, on behalf of Strathmore, offered to reduce the rate to plus 120 for an extension of ten days and Mr. Martell expressed his agreement; do you not? A. I do, sir.

Q. Do you say this afternoon that that was on the 17th or the 18th? A. I believe, sir, that that was the final statement by Mr. Martell, accepting the extension of the charter for ten days, and the rate at 120 per cent, to the best of my knowledge and belief, was on Friday, April 18th.

[88] Q. You have no diary entry concerning this on that day, have you? A. No, sir.

Q. You went through, when the matter began to get sticky, and you tried to make your diary right; is that correct? A. I tried to make my diary in chronological sequence, sir.

Q. You mean you didn't even try to get it on the right day; is that so? A. Maybe at that time, no. I wanted sequence. That, to me, was the most important, the sequence of the negotiations, as I recall.

Q. So that, today, you say with considerable assurance, that this conversation was on the 18th, although your diary entry is on the 17th? A. I say, sir, that the final negotiation, the final agreement with Mr. Martell, was on the 18th.

Q. Do you remember, on your deposition, you testified that you didn't think there was any conversation on the 18th? A. I don't recall that, sir. I am sorry. I have not read my deposition since the day you took it.

Q. Why do you say that? A. Because I didn't see any purpose in that.

[89] Q. Why do you tell me that? A. Because I didn't think it was necessary. Just, as a matter of fact, you asked me if I remembered something. I didn't remember it, because I didn't study it.

Q. I didn't ask you if you had read your deposition. A. No, sir.

Q. Why did you tell me that? A. I made a statement that I shouldn't have made. I am sorry, sir.

Q. I am curious now to inquire into your attitude of mind. A. If you have a question to ask me, ask it and I will answer you.

Q. I am asking you one now. What is your attitude here on the witness-stand? Are you trying particularly to help Strathmore in the case? A. I am trying to state the facts as they occurred.

Q. You don't say you didn't prepare for your testimony here today, do you? A. No, I don't say that I did not prepare for it.

Q. You read your diary? A. Absolutely.

Q. Conferred with Mr. Cardillo, did you, and Mr. Tiffany? [90] A. Yes, sir.

Q. But you didn't read your deposition, is that right, sir? A. That is right, sir.

Q. At Page 37 of your deposition, this appears, and I will read you this and ask you if this was the testimony you gave:

"Question: Did you have any conversation with anybody representing Coastal Oil on the 18th?

"Answer: To the best of my—my notes do not so stipulate.

"Question: You have no recollection of any conversation on the 18th?

"Answer: I have no recollection of any conversation on the 18th on it. Well, I don't know, my notes do not say."

Did you give that testimony?

A. Yes, sir.

Q. But now you do have a recollection of conversation on the 18th, is that right? A. Yes, sir.

Q. What was said at that conversation on the 18th? A. That was the final consummation of the extension, sir, of the addendum.

[91] Q. What was said? A. In which I, in using the owner's discretion, or I should probably get a little better—

Q. I am asking what was said. A. On the 18th, I stated to Mr. Martell that the owner would agree to 140 per cent for a ten-day extension of the cancelling date, and if she made her original cancelling date—I don't know whether I said April 30th, because it wasn't necessary, he understood what I meant—the original cancelling date and they would agree to 120 if she missed her original cancelling date, implying that if she reported on or about the 10th for a ten-day extension.

Q. Is that all you said, in substance, I mean? A. In substance, that would have been the substance, yes, sir.

Q. In substance, what did he reply? A. In substance, he said, "Well, that looks like it. O. K., yes, I agree." I would not say he used those exact words, sir. No, he said, "No, it still looks high."

Then I had the discretion, I had the owner's discretion to go to 120 regardless of whether she made or missed her original cancelling date of April 30th. To which I then disclosed my discretion to him and asked [92] him if he would agree to 120 if she made or missed, and it was agreed.

Q. Is that the substance of everything that was said in that conversation, as well as you can recall it? A. I might have asked him how his wife was or something.

Q. I am talking about the matters that pertain— A. They are the basic facts.

Q. Everything that pertains to this charter-party and the alleged extension? A. To the best of my knowledge, yes, sir.

Q. You say that conversation took place on the 18th? A. I believe that was the final conversation. Yes, sir that was the final conversation, and the agreement had been made.

Q. You say that that took place on the 18th? A. Yes, sir, I am most confident that that took place on the 18th.

Q. You remember, of course, that in your deposition, you said that these conversations took place on the 17th:

do you remember that? A. I believe I said that my book indicated they were on the 17th.

Q. When did you write the entry that appears at the top of page for April 18th, "Draw addendum Strathbay, 120, [93] ten days."? A. That was drawn, sir, on April 18th.

Q. Did you hear my question, Mr. Winterberger? Did you understand it? A. Yes, you said, when did I write it.

Q. Yes. A. The entry shown on April 18th "draw addendum Strathbay, 120, ten days."

Q. When did you write that? A. On the 18th.

Q. You mean on the very day that you drew the addendum, you wrote a note in your diary to remind yourself to do it? A. I wrote that in my diary, sir, on the 18th, yes. I don't know whether I did it to remind myself, or whether I just wrote it down there.

Q. I suggest to you that if your conversation about the drawing of an addendum to the charter was on the 17th, it would be logical for you to write a memorandum for the following day of your diary, to remind yourself to draw an addendum. A. We don't draw addenda, as I recall, unless they are finalized.

Q. Referring to the page of your diary for April 17th, [94] can you tell me what was originally written under the word "Coastal", and "Chet"? A. I will again go over to the window. I haven't paid much attention to it. I think it is "he".

Q. The words in your diary on April 17th, "Strathbay suggested 140 per centum, ten days"— A. Repeat that, sir.

(Pending question read to the witness.)

Q. That referred to an offer by you to extend the time for ten days and to reduce the rate to 140; is that right? A. That is right, sir, yes.

Q. On the next line or two, the diary now reads, "Coastal Chet says will agree 120 if make cancelling, 100 if misses."

Did you write that to reflect something that Mr. Martell said to you? A. Yes, sir.

Q. On the next line, next two lines, there appear these words, as I read them: "Owner agrees 120 if misses or makes." Is that correct? A. That is what it says, yes, sir.

Q. Did you write that to reflect the authority which you said you had from Mr. Vatis to exercise your discretion? [95] A. I don't believe, sir. That is the discretion that the owner had given me, and I would also say, sir, that was what was agreed.

Q. The word "owner", as you have written it there, refers to Vatis and Strathmore Steamship Company? A. That is right.

Q. I see that something has been erased after the last word I read to you.

Can you tell me what word that was before it was erased? A. I believe that says "agreed."

Q. When did you make that erasure? A. I did make that erasure, yes, sir.

Q. When did you make it? A. I cannot say, sir. Maybe when it got "sticky".

Q. Further down the page; written at something of an angle to the printed line, I see four lines, and you please tell me if I read them correctly: "140 makes, 120 M,"—does that mean misses? A. It does.

Q. "120 misses, accept." A. Right.

Q. Have I correctly interpreted these words? A. That is right.

[96] Q. 140 makes and 120 misses refers to almost the earliest of the proposals that you made to Mr. Martell, does it not? A. It is the second proposal, sir.

Q. But not one that was agreed? A. It was not agreed to, no, sir.

Q. "120 makes, accept." Is that one entry; does that refer to one conversation or proposal? A. I would say, sir, that that is the final note that I made here, "120 accept".

Q. You say that "120 makes, accept" refers to the agreement that was made to amend the charter? A. Yes, sir.

Q. There isn't anything in that entry about missing the cancellation date, is there? A. No, sir.

Q. So that if that represents the agreement, the agreement was 120 if she makes the cancelling date, and no agreement if she misses; is that right? A. Would you repeat that, sir?

(Pending question was read to the witness).

A. There was an agreement, sir, that the rate would be 120 if she missed also.

Q. Mr. Winterberger, I am asking you these questions [97] about your diary to see if you can point to anything in your diary, at least on this page for April 17th or 18th, where you have written down anything to indicate that Martell agreed to a ten-day extension at a rate of 120 per cent? A. Yes, sir.

Q. Will you show me the words which you say reflect that? A. "Draw addendum Strathbay, 120, ten days".

Q. None of this other stuff refers to the agreement; right? A. Yes, it refers to the negotiations, sir.

Q. Not the agreement, is that correct? A. It refers to the agreement, yes.

Q. Maybe I haven't put my question quite right, Mr. Winterberger. Can you point to anything on these pages of your diary which represent an entry made by you to record Mr. Martell's agreement to a ten-day extension? A. I can say, sir, that these little scribbled notes, to me; probably mean more than they do to you. And this little item on April 19th, "draw addendum Strathbay, 120, ten days," to me, means that that agreement was finalized.

Q. We will just pass that by for the moment. Is there anything else on these pages for April 17th which [98] represents what you say was Martell's agreement to a ten-day extension? A. Is there anything—read that back, please.

(Pending question read to witness.)

Mr. Cardillo: If your Honor please, he says, "On these pages for April 17th."

Q. April 17-18, the open page before you, Mr. Winterberger. A. There may not be anything here that you would, sir, interpret, but it is very clear to me that Mr. Martell agreed to 120 per cent whether she made or missed her original cancelling, and if it were not a fact, I would not have written that note on the 17th.

These notes on the 17th do reflect those negotiations, sir. And the finalizing of those negotiations—

Q. Where does it say that? A. To me, it says it, sir, quite clearly.

Q. Where? A. It says, sir, that he agreed to 120 per cent makes. The mere fact that I didn't put misses down, it wasn't necessary. That is a very scribbled note. I put that note at the top of my page "Draw addendum."

Q. It wasn't necessary to put down anything to record what you say was his agreement to 120 for a ten-day [99] extension, even if she missed, is that what you say? A. This was a very simple thing. There was no sense in me writing down back and forth. This is a very simple thing.

It wasn't complicated. I didn't have to write down every word that I had with Mr. Martell to convince myself that that agreement had been made.

Q. You now explain your failure to write anything other than the entry at the top the page for April 18th, by saying that this was very simple and it wasn't necessary? A. I don't say it was a failure. It was not necessary; it was not complicated. I didn't expect to have any difficulties with Mr. Martell on the thing.

Q. You went to your diary after the thing got "sticky" and attempted, you told me, just since luncheon, to put down everything that would reflect the things that happened. But, you nowhere wrote down the words "Martell, Coastal," or the word "agreement", in conjunction with the extension

of ten days? A. The April 18th entry, to me, is important. That is important to me.

The Court: Wait a minute now. Listen to the question that counsel asked you, and try to answer it. Don't tell him what is important to you and what isn't [100] important.

Mr. Underwood: I would like to have the question read. I would appreciate a yes or no answer. I have no objection to his making any explanation he wishes to.

(The portion of testimony requested was read by the reporter.)

A. It does not so appear here, sir.

Q. Will you please turn to the pages of your diary for April 21st and April 22nd? A. (Witness complies.)

Q. Did all the conversations recorded on those two pages occur on one day or more than one day? A. I believe more than one day.

Q. Some of them on the 21st and some of them on the 22nd? A. Yes, sir.

Q. Which entry records the conversation that was first in point of time on those two days? A. The entry appearing on April 22nd in the book here.

Q. So that, although it happened on the 21st, you wrote it on the page for the 22nd? A. Yes, sir.

Q. You didn't, in order to keep the sequence of [101] the events properly, even so, you didn't make any changes when the thing got "sticky"? A. Read that question, please.

(Pending question read to the witness.)

Q. Can you answer that either yes or no, and then you may explain?

Mr. Cardillo: I don't think the question is possible of a yes or no answer.

The Court: Yes, it is.

Mr. Cardillo: Then I misunderstood it as the reporter read it.

The Court: Perhaps the question might be improperly phrased. The purport of the question, it seems to me, can be answered yes or no.

He wants to know, notwithstanding your previous testimony, you didn't make any change in the entries on April 22nd?

The Witness: I have not made any changes in this book, sir. No, I haven't made any changes in it, sir.

The Court: Was that your question, Mr. Underwood?

Mr. Underwood: Yes; thank you, sir.

By Mr. Underwood:

Q. Do you recall how many conversations you had with [102] Mr. Martell on April 21st? A. On April 21, I believe there was one definitely, and probably two. Yes, I believe there were two.

Q. What was the substance of the first? A. Wait, you are not talking about the book here now; you are talking about the 21st?

Q. What you now say happened on April 21st. A. On April 21st?

Q. I want you now to tell me, please, the substance of the first conversation. A. The substance of the first conversation, sir, Mr. Martell called me and advised me that he would not sign the addendum because he felt that the owner had misrepresented the position of the vessel from the time she was fixed.

Q. At the outset. A. I advised Chet that he had a verbal agreement. I also suggested that he speak with the owner.

Q. In giving that testimony, you are refreshing your recollection by reading the first seven lines on the page of the diary? A. I am not reading. I gave the same testimony.

Q. You have looked at it? A. You are asking me to look at it.

Q. But you have? A. Yes.

[103] Q. Is that the substance of your first conversation? A. That, I believe, is the substance of the first conversation, with the exception that I gave him the owner's telephone number.

Q. How about the second conversation? A. I believe the second conversation, sir, was when I called Mr. Martell, or he called me—that I cannot be sure of—in which I advised Mr. Martell that from the information he had given me, after he had spoken with Mr. Martell and spoken with the owner, that there didn't appear to be any question that the vessel would have arrived at Corpus Christi on April 22 or 23, if she had operated normally.

If she had not had undue delays and things that happened to the vessel beyond the owner's control, and I also dictated a log to Mr. Martell which the owner had given me, a log of the movements of the vessel from prior to the time of fixing, March 27th through, I believe, this date, the 21st.

Q. Was anything else said in that second conversation? A. To the best of my knowledge, there was no further conversation that day.

Q. Do you remember, when you gave your deposition, [104] of giving the substance of the first conversation and the second conversation on either April 22nd or April 21st, whichever it was; do you remember that? A. I don't remember specifically what I gave in my deposition, sir. I am sure that the text was the same as this.

Q. Do you remember that you said that you thought they were all the same day and not on two days? A. I don't recall that, sir, no.

Q. At Page 40, were you asked this question and did you make this answer: "Question: First let me ask you one more question:

> Did the conversations referred to by these notes on the pages for the 21st and 22nd occur partly on one day and partly on the other day, or were they all the same day?

"Answer: I am inclined to believe they were all the same day. I couldn't be sure."

A. That is right, sir.

Q. Well, I take it today that you are not inclined to believe that they were on the same day, but quite the contrary—you definitely assert they were not on the same day? A. I have had a lot more time to think about this, sir.

[105] Q. Whether you have had time to think about it or not, Mr. Winterberger, do you wish to change the testimony you gave on your deposition; is that correct? A. I do not wish to change the substance of anything I said in my deposition, no, sir.

Q. You just heard me read the answer to my questions.

Mr. Cardillo: If your Honor please, Mr. Winterberger has testified here essentially that the conversation which he had on the 21st covered all of the entries which appear on the 21st and the 22nd. All of which is in accordance with your question in the deposition. I think, in cross-examination, making an assumption which does not appear from either his testimony or his deposition, is improper.

The Court: No, that isn't quite so. He has testified, as I understand it, according to the deposition, he testified that he thought it all occurred on one day. Mr. Underwood's next question was: "You now say that it didn't occur on one day—it occurred on April 21st and April 22nd?"

That is substantially what you asked, Mr. Underwood? Am I right?

Mr. Underwood: Yes, sir.

Mr. Cardillo: All the conversations that he has [106] testified to here cover all of the entries on the 21st and the 22nd, and furthermore, he did add that he couldn't be sure in the deposition.

The Court: You are arguing with me now.

That is what I deduced from the testimony. Counsel has a right to ask such questions as he sees fit in cross-examination, and in the manner he sees fit.

I certainly don't have to advise him of the bounds of cross-examination or the propriety. He is much too learned.

By Mr. Underwood:

Q. Then I asked you some questions about the first conversation, and you answered them, Mr. Winterberger. Then I asked you about the second conversation.

Reading from Page 43, Mr. Cardillo,—Mr. Winterberger, I am going to read you two questions and answers and ask you if you gave this testimony in your deposition:

"Question: Was there another conversation that day?

"Answer: Yes, there was.

"Question: Tell us the substance of it."

[107] Mr. Cardillo: On Page 43?

Mr. Underwood: Yes.

Q. Then Mr. Cardillo interjected and said: "Is this with Mr. Martell?" And Mr. Winterberger is recorded as having said, "Yes, this was with Mr. Martell, because I have some notes here of Owner's conversation."

This is the continuation of your answer:

"Chet says he does not agree—I should put that as 'he does not remember'. Will you change that please, sir? Mr. Martell stated that he did not remember agreeing to the ten-day extension of the cancellation, but regardless insists upon a clause to the effect that the vessel would proceed to Corpus Christi immediately upon discharging the present voyage."

Did you give that testimony?

A. They are words that I stated, yes, sir, which I read from this book. It is identical to what is in this book.

Q. Whether it is identical with the book or not, Mr. Winterberger, that isn't my question at the moment, sir. The questions and answers which I just read to you were put to you and the answers given by you on your deposition; isn't that right? [108] A. If they are in that book, I am sure they are.

Mr. Underwood: I am sure Mr. Cardillo will concede that I read accurately.

Mr. Cardillo: I certainly do.

By Mr. Underwood:

Q. It is significant to me, Mr. Winterberger, and I would like to ask you this again: Your first words after Mr. Cardillo's interjection, were: "Chet says that he does not agree", and then you corrected yourself: "I should put that that 'he does not remember'. Will you change that, please, sir?

Do you remember that? A. Not specifically.

Q. Your first immediate quick response was that Chet said he did not agree, isn't that true? A. That is what it says there. If it says there, I will believe you, you are reading from that book.

Mr. Underwood: If your Honor please, I would like to offer it—the diary—in evidence.

Mr. Cardillo: If your Honor please, I have no objection to the introduction of the diary into evidence, with the understanding that the same reflect entries made by Mr. Winterberger for his own personal record and to refresh his own personal [109] recollection, and that as such, they are not binding on the Libelant, except to the extent they reflect the negotiations.

The Court: You are not offering the diary as being evidence of the accuracy or truthfulness of the contents thereof?

Mr. Underwood? No, sir.

The Court: You are offering it only for the purpose of the Court's consideration in determining the credibility of this witness in so far as erasures or entries made concerning this particular transaction?

Mr. Underwood: That is correct, sir.

Mr. Cardillo: With that understanding, I have no objection.

The Court: I will allow it to be received.

(Diary referred to above marked Respondent's Exhibit B in evidence.)

The Court: What is the exhibit number that has the additional matter written in?

Mr. Underwood: A.

By Mr. Underwood:

Q. Mr. Winterberger, I show you a photostat of a charter which has previously been marked Respondent's [110] Exhibit 3 for Identification: Is that a copy of the Pure Oil charter that you negotiated for Strathmore? A. Yes, sir.

Q. On what date did you negotiate that? A. On April 24th, sir. I negotiated April 23rd and 24th. I finalized it on April 24th.

Q. The rate was how much? A. The rate was plus 50 per cent.

Q. As compared with the rate of the original charter of the Strathmore to Coastal, plus 190? A. That is right.

Q. The market had slipped very badly, as you said; had it not? A. Yes.

Q. You knew, of course, that there was a strike imminent at the Gulf, particularly at Sinclair's plant, did you not? A. When?

Q. In April. A. No.

Q. When did you first learn of it? A. What do you mean by "imminent" sir?

Q. Come now, Mr. Winterberger— A. There was talk about a strike.

[111] Q. Don't you know what the word "imminent" means? A. I am sorry, I don't use it very frequently.

Q. Do you know what it means? A. I believe it means, what I thought it meant when I first asked you the question, sir, was there definitely going to be a strike at Sinclair—

Q. I think you described yourself, sir, as a tanker-broker, didn't you? A. Yes, I stated so.

Q. I assume you try to keep yourself as thoroughly versed in all conditions that affect the tanker market as you possibly can? A. Yes.

Q. One thing that seriously affects tanker's prices is the imminence of labor disputes, is it not? A. I wouldn't say so. No, I wouldn't say so.

Q. You know, of course, that all these charters have demurrage clauses? A. Yes, sir.

Q. If a ship makes a tender and a strike occurs, it goes on demurrage and costs the charterers sometimes a handsome figure; you know that, don't you? A. Yes, sir.

Q. Don't you know, also that charterers have very much in mind the possibility of labor disputes when that [112] exists? A. Not because of the possibility of demurrage, I don't think.

Q. That is one reason, isn't it? A. I can see a tanker market improving tremendously at times, sir, and going down for the same reason.

Q. Do you agree with me that the imminence of a labor dispute which might, if it occurred, or would, if it occurred, delay loading, would affect the tanker-rates? A. I am afraid, sir, I do not know the meaning of "imminence". I would like to have a definition of the word.

Q. Perhaps we can agree that it means probably about to happen.

The Court: In the offing.

A. Yes, thank you, sir.

Q. You knew that all during April, didn't you? A. I don't know whether I did or not, sir.

Q. Can you recall when you first learned that the tanker strike was in the offing? A. This particular one that was about to happen in May of 1952? Actually it was a yearly occurrence. There was always imminence of strikes down there every year. There is always a possibility.

[113] Q. You knew that at the time, didn't you? A. I don't know when I knew it. I don't know exactly when I can say definitely that I knew there was going to be a strike. They had people negotiating the thing.

Q. I would like to cut this short. I am almost through with you, Mr. Winterberger. A. I don't care how long I stay here, sir.

Q. I am not asking you if you knew for certain there was going to be a strike. Please don't misunderstand me. I am asking you if you weren't aware, at least by the middle of April, 1952, that there was a serious threat of a strike in the Gulf which would affect the loading of this ship? A. If it were printed in the papers, I would probably know it, yes.

Q. Do you deny that you knew it? A. Not if it was in the papers.

Mr. Underwood: I have no further questions.

Redirect Examination by Mr. Cardillo:

Q. At one time, you were reading from your diary and you read the words "draw addendum Strathbay", and you referred to those as appearing on April 19th. Did [114] you read that date correctly?

Mr. Underwood: If I said the 19th, of course, 18th is correct.

Mr. Cardillo: You didn't say the 19th, Mr. Underwood.

Mr. Underwood: However I said it, the date as appears in the diary is the 18th.

The Witness: Yes, it was on the 18th. I might have said the 19th, but it was the 18th.

By Mr. Cardillo:

Q. Was it the purpose of your notes in the diary to record the negotiations as they took place? A. Yes, sir.

Q. Did you intend that those entries be made with the thought that they should be clear to anyone who read them, or clear to you? A. Clear to me, sir.

Q. You stated that there were often talks of strikes. Were there always strikes? I am referring, of course, to the Gulf strike in particular. You said that occurred every year. Was there a strike every year? A. I wouldn't know that. I know that that was a negotiated—that was the time when it seems—I believe that that is an industry-wide Union, or something.

[115] Q. Were the strikes often settled. Were the threats of strikes often dissipated by agreement between the workers and the petroleum industry? A. They certainly could be, sir. If they were negotiating, I should think they could be. I am not a labor man, I don't know.

Q. Mr. Winterberger, was it normally the custom, when you negotiated a charter-party or agreement for a broker, what does he normally do?

Mr. Underwood: I object.

The Court: What does who normally do?

Q. The broker. A. You mean as a broker?

The Court: You are talking about, are you not, a custom of the trade?

Mr. Cardillo: Yes, your Honor.

The Court: I will allow that.

A. Well, how far back do you want me to go? I shop around in the market for business. At the same time I have in mind certain boats or having boats in mind, I have business in mind. It is customary for the owner to give the broker an offer to convey to the prospective charterer, in which he gives the conditions on which the owner will agree to charter his vessel.

[116] Negotiations will continue until a time of finalizing. When the charter is finalized and the agreement between the two principals confirmed, the charterer usually sends a letter—affixes a letter to the charter and possibly one to the owner—

Q. Just a minute, you said the charterer sends it—A. No, the broker, outlining the conditions of the charter. That is usually the case. However, for instance, for the Standard Oil of New Jersey, that isn't necessary.

The Court: I have let you ask this question. As he goes along, I can't see the materiality of it, or the relevancy of it in this particular action.

Mr. Cardillo: I want to bring out, if your Honor please, with regard to this particular addendum, that they followed the normal, habitual custom.

The Court: You are nowhere near that. There is no question, so far as you have been asking him, about the original charter. It is admitted there was an original charter. If you are going to talk about a custom, pick it up from there.

Mr. Cardillo: I didn't ask him about the original charter.

By Mr. Cardillo:

Q. I want to know, Mr. Winterberger, what is the [117] normal—I am not referring to the charter of March 27th—you stated that you communicated with the charterer after having authority from the owner and you negotiate.

Then what happens? Do you reach agreement, or what happens? A. You reach agreement and then you draw up—as I said, you may send a letter of transmittal, or you draw up the charter-party.

Q. When is the agreement reached? A. The agreement is reached at the time both parties agree to the terms.

Q. Is that on the telephone? A. Yes, many, many times.

Mr. Underwood: If your Honor please, I am sorry; I object to this.

The Court: Yes, I can't see it now.

Mr. Underwood: I move to strike it out.

The Court: I won't strike it out, but I will sustain the objection to any further interrogation along this line unless it has something to do with these two agreements, or these two letters that have been marked in evidence here; namely, the addendum of April 18th and the letter of April 19th, and the additional one of April 22nd.

[118] I think it is Libelant's Exhibit 4; if it has anything to do with that—

Mr. Cardillo: Your Honor, what I am trying to show is merely this: That on the 27th of March, when the original charter-party was made, it was forwarded with a covering letter, which is a normal, customary letter. I also propose to show, after introducing this in evidence, that it is exactly the same form as the covering letter which was sent in cover of the addendum.

The Court: Is that the letter which went with the original charter?

Mr. Cardillo: Yes, your Honor.

By Mr. Cardillo:

Q. After you negotiate a charter-party, you forward it to a charterer for signature. Is this the type of letter that you normally send? A. It is usually forwarded to the owner for signature, and then after the owner signs it and sends it back, then it is submitted to the charterer.

Mr. Underwood: If your Honor please, I object to the question as to whether this is the usual type of letter, but I have no objection to the letter if Mr. Cardillo wants to offer it.

[119] The Court: Are you offering the letter? He has no objection to it as a letter that was written with this charter.

Mr. Cardillo: I am going to offer the letter, your Honor. I do so offer it.

Mr. Underwood: No objection.

(Letter referred to above was marked Libelant's Exhibit No. 7 in evidence.)

The Court: Is that the letter sent to Coastal Oil with the original charter; is that a proper description of it?

Mr. Underwood: Yes, sir, under date of March 31st; I believe.

By Mr. Cardillo:

Q. Mr. Winterberger, I show you Libelant's Exhibit No. 7, which is the covering letter which you sent with the charter-party to Coastal Oil Company of March 27th, for execution. I note that it is dated March 31st.

Is there any reason why the letter should be dated March 31st and the charter-party dated March 27th? A. Yes, the charter-party went to the owner, back to us, and then we transmitted it. There would be a time-lag.

Q. Why did you date the charter-party March 27th? A. That is the date that it was finalized, the date that [120] the fixture was made.

Q. Is that the same reason that you dated the addendum, Libelant's Exhibit No. 3, on April 18th? A. That is the reason that it was dated April 18th, yes, sir.

Q. Mr. Winterberger, have you ever shown the diary, Respondent's Exhibit B, to me or to anyone in my office prior to the date of your deposition, November 4, 1955. A. No, sir.

Q. Did you take that diary from my office at the close of your deposition? A. Yes, sir.

Q. Have you shown that diary to me or to anyone else in my office since that date, and before we were in court today? A. No, sir.

Q. Had you put the diary in the possession of anyone in the office of Nelson, Healy, Bailey & Burke, prior to coming to court today? A. No, sir.

Q. Did anyone at that office ever look at it? A. No, sir.

Mr. Cardillo: If your Honor please, if I may, while I understand I am not going to submit any evidence [121] on the question of damages here, I think it would be in order, unless your Honor sees otherwise, to submit evidence of attempts by the Libelant to charter the vessel again after the cancellation.

If your Honor has no objection to that evidence, I would like to submit it now. It does, however, have to deal with damages.

The Court: There isn't any question that the boat was not used by the Coastal Oil Company, is there?

Mr. Underwood: No question.

The Court: That is a question of damages, and nothing else, as I see it. What bearing can it have on this particular question that is before me?

Mr. Cardillo: Your Honor, essentially it has no bearing on the question as to what agreement was made. I just want to suggest, if your Honor likes, to have testimony on it.

The Court: No, I don't think so. That is a matter of damages, I suppose. I don't see what else.

Do you agree with that, Mr. Underwood?

Mr. Underwood: Yes, sir.

Mr. Cardillo: That is all.

[122] *Recross Examination by Mr. Underwood:*

Q. Would you please turn, Mr. Winterberger, to the page in your diary of April 18th, and we will look at it again? A. Yes, sir.

Q. In your deposition, were you asked these questions and did you give these answers, Page 39:

"Question: What are the words on the first two lines of the page for the 18th?

"Answer: Draw addendum 'Strathbay'.

"Question: Did you write those?

"Answer: That could have been written on Thursday, the 17th.

"Question: Do you say that it was?

"Answer: No, I don't say that it was, but I believe it was.

"Question: It could have been written on the 18th?

"Answer: It could have been written on the 18th."

Did you give that testimony? A. If it says so, that is what I said, yes, sir.

Mr. Underwood: Mr. Cardillo, will you concede that I have read accurately from the transcript?

Mr. Cardillo: I will so concede.

[123] By Mr. Underwood:

Q. You have said something just now about a custom, Mr. Winterberger. I suppose, when you drew the original charter here, you drew that pursuant to the usual custom in the brokerage business, did you not? A. I would say so, yes, sir.

Q. It is customary, after you reach an agreement over the telephone for both to write a fixture letter, —write a full formal charter, is it not? A. I said it is usual. It is not unusual not to write a fixture letter.

Q. But it would be very unusual not to write a charter, is that right? A. Yes.

Q. You sent that to the owner and he signed it and you sent it to Coastal, and they signed it. Then you distributed reproduction copies to both sides? A. Yes.

Q. You say that addendum was agreed to in a telephone conversation. Do you say that you prepared a written addendum, pursuant to the usual custom so to do? A. The addendum was a very simple document, sir.

Q. Just answer my question, and then you may explain all you please. [124] A. I am sorry. Read that back, please.

(Pending question read by the reporter.)

A. I prepared an addendum, yes.

Joseph A. Winterberger—for Libelant—Recross

Q. It is customary, is it not, when some amendment to a charter is agreed to, to prepare an addendum? A. It is customary to prepare an addendum. Whether you mean typewritten, I don't know. Will you state whether you want it typewritten, or written?

Q. I am asking you. Is it not customary in the brokerage business, when some change in the charter is agreed upon by the parties, to reduce it to writing in the form of an addendum? A. It is customary to prepare an addendum for submission for signature.

Q. You did so prepare an addendum in this case, in writing, did you not? A. I prepared an addendum.

Q. You sent it out to be signed and the owner signed it? A. I sent it out. He may have come to my desk. I am not sure. But it was given to the owner for signature.

Q. You sent it to the charterer and the charterer never signed it; is that correct? A. That is apparently so. I don't know whether I have [125] seen his copy or not.

Q. You have never seen a signed copy, have you? A. No, I have not.

Q. Now, in the ordinary course of your business, when the charterer gets an addendum signed by the owner, if he has agreed to it, he would sign it and send it back to you, just as an original charter, would he not? A. Yes, sir.

Q. But he never did that in this case, did he? A. No, sir.

Q. Did you ever write him a letter demanding that he sign? A. No, sir.

Q. Did you ever call him up and demand that he sign? A. I don't know whether I did or not. I could have in a conversation. I don't know.

Q. You certainly have no record in your diary of any such demand that this charterer sign this addendum, do you? A. There is no record in my diary that Mr. Martell moved either, and this was at this time.

Mr. Underwood: If your Honor please, may we strike that out and instruct the witness to answer my question?

[126] The Court: Strike out the answer.

Now, listen to the question.

Read it back, please.

(Pending question read by the reporter.)

The Court: The question is, was there anything further in your diary about that?

The Witness: No, sir.

Mr. Underwood: I have no further questions.

Redirect Examination by Mr. Cardillo:

Q. Mr. Winterberger, you did discuss with Mr. Martell the question of signing the addendum, did you not? A. Yes, sir. It is not only a question of discussing it, it is an understood agreement. When an agreement is made, you sign it and you send it back.

Q. Mr. Martell, after April 21st and 22nd, indicated to you that he would sign it?

Mr. Underwood: If your Honor please, I object to the form.

The Court: Yes, the form is improper. You can ask him what conversations he had with Martell, about the addendum, if you want to use that word.

Mr. Cardillo: I will withdraw the question, your Honor. I don't think there is any point in [127] belaboring the issue. That is all.

The Court: Are you finished with this witness?

Mr. Cardillo: Yes, your Honor.

The Court: All right.

(Witness excused.)

Mr. Underwood: If your Honor please, may I at this time ask leave to take this book to a document examiner?

The Court: I am still going to rule the same way on it. This is a civil matter. I am not going to change my ruling.

Mr. Underwood: Very well.

Mr. Cardillo: Mr. Vafis please.

ANASTASIOS T. VATIS, called as a witness and having been first duly sworn, testified as follows:

Direct Examination by Mr. Cardillo:

Q. Mr. Vatis, where do you reside? A. In White Plains, New York.

Q. You are an officer of the Libelant, Strathmore Shipping Company, are you not? A. Yes, I am.

Q. Were you an officer in 1952? [128] A. Yes, I was.

Q. Did you have any conversations with Mr. Winterberger of Simpson, Spence & Young in or about April of 1952, with regard to the charter-party of March 27th with Coastal Oil Company? A. Yes, I had.

Q. Do you recall when the first of these conversations took place?

Mr. Underwood: If your Honor please, purely for the purpose of expediting this, I would like to object to anything prior to the making of the original charter-party.

The Court: I will take it. Overruled. Fix the time, if you can.

Mr. Cardillo: I refer to in April of 1952.

The Court: All right, that is after the charter-party was signed?

Mr. Cardillo: Yes, your Honor.

The Court: Go ahead.

A. On or about April 17, 1952.

Q. Was that the first conversation you had with Mr. Winterberger? A. Yes, the first direct conversation.

Q. Had there been a prior conversation by anyone [129] in your office with Mr. Winterberger in respect of that charter? A. Yes, by my brother.

Mr. Cardillo: In order to save time, would Mr. Underwood concede that he is referring to the conversation that his brother testified to this morning?

Mr. Underwood: I don't know what conversation.

The Court: How does he know, as a matter of fact, if he wasn't present at the conversation? What are you going to do about that?

Q. Were you present when your brother spoke to Mr. Winterberger? A. Yes, I was. We sit in the same office.

Q. Do you recall the substance of that conversation, between your brother—do you recall what your brother said?

Mr. Underwood: May the time be fixed?

A. On April 8th, my brother called Winterberger on the telephone and he said that due to certain delays encountered by the "Strathbay" it would be wise to ask for a short extension to the cancelling date of the charter-party in question.

Q. Did your brother give Mr. Winterberger any [130] authority in respect of such an extension at that time? A. Yes, he did.

Q. What was the substance of the authority? A. That he was willing to reduce the rate from USMC plus 190 to USMC plus 170 for an extension of approximately three days.

Q. Do you know whether Coastal Oil Company, the Respondents in this case, ever agreed to the proposal? A. No, they did not agree.

Q. Did you have any conversation subsequent to that occasion, that is, subsequent to April 8th? A. Yes, I believe on—

Q. Just a minute. With Mr. Winterberger, of Simpson, Spence & Young? A. Yes, I believe it was on or about April 17th.

Q. What was the substance of that conversation? A. Well, we had not heard from Coastal Oil to our original proposal, and we wanted Mr. Winterberger to contact Coastal Oil and negotiate again for an extension.

Q. Did you authorize Mr. Winterberger in any particular at that time. A. Yes, the market had dropped by that time and I authorized Mr. Winterberger to offer the vessel at plus 140 if she made the cancelling date of April 30th, or at 120 [131] if she missed it, provided, of course, they would extend the charter for ten days.

Q. Did Mr. Winterberger report back to you as to whether or not he made that proposal to the respondent? A. Yes, he said that he had talked to Coastal Oil and that they had made a counter-proposal.

Q. What was the substance of the counter-proposal that Mr. Winterberger reported to you? A. Well, in short, Coastal was willing to extend the charter for ten days if we would reduce the rate to 120—if we made the original cancelling date, and to 100 if we missed it.

Q. What did you reply to Mr. Winterberger? A. Well, I replied to Mr. Winterberger that that was a little bit too low and we would not accept that because there was still hope that we could make the original cancelling date.

However, I told him that in view of the circumstances, if he could have Coastal agree to 120 above the United States Maritime Commission rate, regardless of whether we reported for loading by April 30th, or by May 10th, the new cancelling date.

Q. Did Mr. Winterberger report to you again on the matter? [132] A. Yes, there were several conversations back and forth, and sometime later he reported that Coastal Oil had agreed to extend the cancelling by ten days, provided we discounted the rate from 190 to 120. In other words, they agreed to our proposal.

Q. That was the final proposal? A. That was the final counter-offer we made.

Q. Did you regard that advice from Mr. Winterberger as binding on you? A. Yes we did, and we signed the addendum without hesitation.

Q. When did you receive the addendum; do you recall? A. It was on Friday, the 18th.

Q. Did you have any further conversation with Mr. Winterberger with regard to any negotiations with the respondent in this case, whether in respect of the charter of March 27th, or the addendum of April 18th, or any other business for the vessel "Strathbay"? A. Well, it was the following week. It was either on a Monday or a Tuesday. I am not certain of the exact date, but Mr. Winterberger called me and he said that Martell had called him and he was very much disturbed because the "Strathbay" was not going to report at the loading port until May 9th.

[133] Q. What did you say to Mr. Winterberger? A. I told Mr. Winterberger that that wasn't so, and I asked him, in order to facilitate matters and rather than talk through a third person, to have Mr. Martell call me directly and I would give him the vessel's exact position.

Q. Did you subsequently hear from Mr. Martell? A. Yes, I believe it was later on the same day that Mr. Martell did call me.

Q. Did he call you, or did you call him? A. No, Mr. Martell called me.

Q. What did he say to you on that occasion? A. He said that he was in a "Hell of a fix", because he understood from various reports circulating in the market, that the "Strathbay" would not report at the loading port until May 9th, and he had some sort of a commitment to pick up that cargo from Sinclair by May 6th, and he was very much disturbed and very excited.

Q. Did he state anything further? A. Yes, he further said that he felt we had misrepresented the position of the vessel and that he would not sign the addendum until he made sure what I told him was correct.

Q. What did you tell him then? [134] A. Well, I told him that on that very day the "Strathbay" was sailing from her last previous loading port, which was in Puerto Rico, and she would proceed directly to New Orleans to discharge that cargo, and from New Orleans she would proceed immediately to pick up his cargo. I gave him the

various dates involved. I showed him that if everything went normally, the vessel would be there by April 30th or May 1st, the very latest, May 2nd.

Q. Do you keep a logbook in your office of the various vessels owned by the Strathmore Shipping Company? A. Yes, we keep a log in which we write the movements of the various vessels down—their arrival, at what port, what cargo they pick up and when they sail.

Q. From what source do you get the information that you enter into this logbook? A. Well, either from the Master of the vessel, himself, by cablegram or telegram, or from the vessel's agents at the various ports.

Q. I show you two papers headed "Strathbay" referring to dates running from March 5, 1952, to June 5, 1952. Are these two pages from that logbook to which you just referred? A. Yes, they are the movements of the "Strathbay".

Q. For the period in question? A. Yes.

[135] Mr. Cardillo: I offer these in evidence.

Mr. Underwood: I object to it on the ground that it is immaterial.

The Court: I will overrule it. I will take it.

(Libelant's Exhibit 8, above referred to, received in evidence.)

By Mr. Cardillo:

Q. Mr. Vatis, you stated that on the day Mr. Martell telephoned you, you advised him that the vessel was leaving from a port in Puerto Rico on that very day. I ask you to look at this log-extract, or page, and I ask you if that reflects—if that refreshes your recollection as to the date of your conversation with Mr. Martell? A. It must have been on the 21st of April?

Q. 1952? A. 1952, on a Monday.

Q. When you gave Mr. Martell the vessel's position were you referring to this log at the time? A. Yes, I was.

Q. After you had given Mr. Martell the position of the vessel, what did he say to you? A. He said that he would verify what I had told him and if what I had told him was correct, he would sign the addendum.

[136] Q. Did you have any further conversation with him on that day, or on any date subsequent thereto? A. No, I told him I would give this log in detail to Mr. Winterberger, who in turn would relay it to him.

Q. Did you then give the log to Mr. Winterberger? A. I believe a little bit later on, perhaps the next day, I did give him a detailed log—to Mr. Winterberger—of the movements of the ship.

Q. When you refer to a detailed log, do you mean this actual log, or do you mean extracts from this log? A. No, extracts from it. I talked, also, to Mr. Winterberger over the telephone.

Q. When did you next have a conversation with Mr. Winterberger? A. I probably did have one the next day, in which he told me that he relayed the log to Mr. Martell.

Q. What date would that be? A. It must have been the 22nd.

Q. Did you have any further conversation with Mr. Winterberger after the 22nd? A. Yes, I did. I thought it was time that we started looking for employment for this ship after the completion of this particular voyage in question.

Q. You spoke to Mr. Winterberger about that? [137] A. I spoke to him, I believe it was on the 23rd.

Q. What was the substance of your conversation on that occasion? A. I told him that the vessel, the "Strathbay" would be free again in the gulf around the 19th of May, and that he should look for some business for those dates.

Q. When you referred to the vessel being free about the 19th of May, did that contemplate the completion of the voyage under the charter covered by the addendum to which we referred? A. Yes.

Q. What did you anticipate or calculate the loading date under that charter to be? A. Well, I calculated that she would load at the very latest by the 2nd of May, and that she would make the trip up here to New York and back to the Gulf in approximately seventeen, eighteen days.

Q. Did you give Mr. Winterberger any authority with respect to fixing the vessel? A. Well, yes, I told him to look around and see who had a cargo.

Q. Did he subsequently report to you?

Mr. Underwood: If your Honor please, again, in the interest of brevity, I object to this on the [138] ground that it is immaterial.

The Court: There has been some testimony by Winterberger that he talked with Coastal Oil about subsequent charters of this same boat. It might become material on the question of whether or not your people, the Coastal Oil, had in fact agreed, as they claim orally, or whether they hadn't.

I will take it on that basis.

By Mr. Cardillo:

Q. What did Mr. Winterberger report to you? A. He reported to me that Pure Oil was interested for a ship like ours around those dates.

Q. Was there anything further? Did he state anything else? A. Yes, he stated that he thought we should offer, or that perhaps they were willing to pay the rate of 50% above.

Q. Did you authorize him to enter into any negotiations with Pure Oil? A. Yes, I did, but in the meantime I don't know whether this was prior to these negotiations or immediately afterwards. He called me and said that Coastal Oil was also interested for a trip up to New York again, around those dates.

[139] In other words, a second voyage like the one we had already with them.

Q. What did you instruct him at that time? A. Well, Coastal was only willing to pay 35 per cent above. I felt that that was too low. As long as Pure Oil Company was willing to pay 50 above, we should go with Pure Oil.

Mr. Cardillo: If your Honor please, I note now it is almost a quarter of four.

The Court: Are you through with your direct with this witness?

Mr. Cardillo: No, your Honor, I am not. I will be about another five minutes, I believe.

The Court: Go ahead.

By Mr. Cardillo:

Q. What further negotiations were there in respect of either the proposal of Coastal Oil or Pure Oil?

The Court: I don't think there is any necessity of going any further into that.

Mr. Underwood: Of course, if your Honor please, this is all incompetent, anyway. The only man who claims to have any conversation with Coastal about it has already testified.

The Court: There may be some corroboration for [140] Winterberger on that particular point, that he did have a conversation. I don't know how heavy it is, but I will take it.

Mr. Underwood: It is of no consequence at all.

By Mr. Cardillo:

Q. Did you then have any conversation after the discussions regarding the negotiations of the charters with anyone else in Simpson, Spence and Young?

The Court: In reference to what?

Q. With reference to the charter of the "Strathbay" to Coastal Oil under the addendum, or the agreement that you

understood to be in effect? A. No, I assumed that everything was in order and we had no further conversations. At least, I didn't have any further conversations with Simpson, Spence & Young.

Q. Did you have any conversation with any one in Simpson, Spence & Young with respect to instructions for the vessel, or her position? A. Myself, no.

Q. Did you receive any advice from anyone at Simpson, Spence and Young to the effect that the Respondent was cancelling the charter-party? A. Yes, I believe on the morning of May 1st.

Q. Who gave you that advice? [141] A. Mr. Patton, of Simpson, Spence & Young.

Q. I show you this letter, dated April 30, 1952, from Coastal Oil Company, addressed to Strathmore Shipping Company. Did you receive that letter? A. Yes, we received this around noontime, May 1st.

Q. Did you receive that in the mail, or was it hand-delivered? A. No, it was hand-delivered.

Q. Do you know by whom? A. Yes, by an attorney in the firm of Foley & Statt, who represented Coastal Oil.

Q. Would that be his card? A. Yes, Mr. Conran.

Q. Did he leave that card with the letter? A. Yes, I presume he did.

Mr. Cardillo: I offer this in evidence.

Mr. Underwood: No objection.

(Document above referred to was marked Libelant's Exhibit No. 9 in evidence.)

By Mr. Cardillo:

Q. Did you give any instructions—did you, or anyone in your company give any instructions to Simpson, Spence & Young in respect of the purported cancellation by the Respondent? [142] A. Not myself, personally.

Q. Did anyone in your company do so? A. Yes, I believe Captain Vatis did.

Anastasios T. Vatis—for Libelant—Direct

Q. Do you know, Mr. Vatis, if the "Strathbay" tendered at Corpus Christi, Texas, under the charter covered by or contemplated by the addendum of April 18th? A. Yes, she arrived, I believe, it was around noontime of May 3rd and tendered the same day.

Q. Did you send advice of the tender to the Respondent, Coastal Oil Company? A. Yes, I believe the Master did, as he was obligated to, that his vessel was in all respects ready to accept cargo.

Mr. Underwood: I have no objection to that.

Mr. Cardillo: I would like to offer this in evidence.

(Libelant's Exhibit 10 received in evidence.)

Mr. Cardillo: It is a telegram from the Master, that Mr. Vatis just referred to. It says: "Hereby tender my vessel, S.S. 'Strathbay' as ready, in all respects, to receive a cargo in accordance with terms. Charter-party as of 1800, May 3, 1952."

The Court: We will adjourn until tomorrow morning at 10:30 a.m.

(Court was adjourned to Thursday April 26, at 10:30.)

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[143] (Trial Resumed)

April 26, 1956, 10:30 a. m.

Same Appearances.

Anastasios T. Vatis, recalled as a witness and testified further as follows:

Direct Examination (Continued) by Mr. Cardillo:

Q. At the close of yesterday's session, Mr. Vatis, you last testified to the fact that the vessel "Strathbay" tendered under the charter-party. Was that tender accepted: do you know? A. No, we never had a reply from Coastal Oil. The Master or ourselves in the office—

The Court: In other words, you never had a reply to your telegram dated May 3rd?

The Witness: That is correct.

By Mr. Cardillo:

Q. Is this a copy of the certificate of registry of the vessel in effect, that was in effect during the period of its charter? A. Yes, it is.

Q. That is a certification, is it, on the back of it? A. Yes, it is.

Mr. Cardillo: I offer this in evidence, if your Honor please.

Mr. Underwood: If your Honor please, this appears to be quite innocuous. I don't understand its purpose. There is no issue in this case about ownership, or flag, or registry.

The Court: What is its purpose?

Mr. Underwood: I object to it on the ground that it it immaterial unless the purpose is disclosed.

Mr. Cardillo: The only purpose is simply for the record to show that the vessel was duly enrolled and duly qualified to serve under the charter-party.

The Court: He isn't raising that question. He admits that.

Mr. Underwood: There is no such issue in the case.

Mr. Cardillo: I wanted to submit certificates of seaworthiness, but if there is no issue on that point then I won't offer that.

The Court: All right. The only issue here is whether or not there was an oral charter, after [145] April 30th, extending the tendering time. That is the only issue I see here.

Mr. Underwood: I think that is correct, sir.

By Mr. Cardillo:

Q. Mr. Vatis, did you press Mr. Winterberger to get the addendum signed? A. No, I did not press Mr. Winter-

berger. It usually takes quite a few days until it is returned to the owner.

Q. Is it usual for a period of time to elapse between a reported agreement and the actual execution of a document? A. Yes, there is quite a lapse of time, and especially with tankers that run on very short voyages, you sometimes get the charter-party after the commencement of the voyage itself.

Q. How long, if you know, does that lapse of time sometimes run? A. A week, two weeks, three weeks.

Q. Who were the original directors of Strathmore Shipping Company? By original, I mean the first elected directors? A. Mr. Augenthaler, Mr. Patton and Captain Vatis.

Q. Do you know how long Mr. Augenthaler and Mr. Patton served as directors? [146] A. Mr. Patton served approximately six months and Mr. Augenthaler about ten to twelve months.

Q. When was it—when did they so serve? A. In the early part of 1948, 1947, late part of 1947 to about the middle of 1948.

Q. Four to five years before this charter-party was effected? A. Yes.

Q. Why did Mr. Patton resign ahead of Mr. Augenthaler; do you know? A. Well, I replaced Mr. Patton as a director in June of 1948. Prior to that, when I was discharged from the Army, I went to the West Coast and I did not come here East, to New York, until March of 1948. So, when I got acquainted with the business, Mr. Patton resigned, and I took over his position.

Q. Did Mr. Augenthaler or Mr. Patton, or Mr. Winterberger, ever have any interest in the corporation—financial interest? A. No, they never owned any stock and never received any compensation for their services as directors and/or officers.

Mr. Cardillo: I think that is all for the moment, Your Honor.

[147] There are other witnesses which we will have which we will use in rebuttal. I am sure, for the present, the Claimant rests.

The Court: You haven't cross-examined this man, have you?

Mr. Underwood: No, I have not.

I would like to put a few questions to him.

Cross Examination by Mr. Underwood:

Q. Mr. Vatis, you had one telephone conversation with Mr. Martell with relation to this "Strathbay" business? A. Yes, sir.

Q. And only one? A. Only one as far as I can recollect, yes, sir.

Q. Did you fix the date on which you said you had that conversation? A. Well, it was either the 21st or the 22nd. I can't pinpoint it to be sure.

Q. Did I understand you to say yesterday, very definitely that it was on the 21st? Was I wrong? Is my understanding incorrect? A. No, I think you are probably right.

Q. Did you say yesterday definitely that it was on the 21st? [148] A. Well, I don't know whether I said definitely, but it was either Monday or Tuesday. It is pretty hard to pinpoint it.

Q. Do you recall on your deposition that you said it was on the 22nd? A. Yes.

Q. You did so state on your deposition? A. Yes, sir.

Mr. Cardillo: Mr. Underwood, if your Honor please, I think the deposition states that he couldn't be sure.

Mr. Underwood: I object to this statement by counsel.

The Court: You will have an opportunity on redirect to clear up what you are about to say, if it is there.

Mr. Cardillo: Pardon me, your Honor.

By Mr. Underwood:

Q. What is it you say that Mr. Martell said in that conversation about whether or not he would sign the addendum? A. Well, of course, I can't remember the conversation word for word, but the essence was that he was very much disturbed that the vessel would not report to Corpus Christi [149] until May 9th. For some reason or other he had to pick up the cargo by May 6th. He heard somehow that the vessel would not report on the 9th. I assured him that it would be there very much before the 9th. I believe it was at the end of the conversation he said, "I am not going to sign the addendum until I am assured that what you are telling me is correct."

Q. He didn't say he would sign if something happened, he said he would not sign unless he found out something; is that correct? A. No, he didn't say that. He said that he would not sign it unless what I was telling him was truthful.

Q. You knew, therefore, at the time of that conversation that you and Coastal were not in agreement about this extension, did you not? A. Not necessarily, no. The agreement was there.

Q. Martell was just telling you there was no agreement unless he found out what you said was true, isn't that correct? A. No, sir, he was telling me he would not honor the agreement.

Q. He said he wouldn't sign it. He didn't use the word "honor"? A. Well, he meant that.

Q. You say he meant that? [150] A. He didn't deny the agreement.

Q. He was telling you that there wasn't any agreement in effect unless he found out what you told him about her position was true? A. He said he would not sign the addendum.

Q. You never had any other conversation with Mr. Martell? A. No, sir.

Q. You never asked Winterberger to get the addendum signed? A. No, sir.

Q. In spite of the fact that you knew that Martell had refused to sign; is that correct? A. Well, it is a loaded question. Can I explain it?

Q. You answer my question and then you may explain anything you like.

Mr. Underwood: Read back the question, please.

(Pending question read by the reporter.)

A. The answer wouldn't be correct if I say just yes or no. I will say no.

Q. Do you want to explain why you say No? A. Yes, because he had Mr. Martell—Mr. Martell did not flatly refuse to sign. He had a condition.

Q. Are you telling us, Mr. Vatis, that in your mind [151] there was even, on that date, no doubt but that you had a valid agreement of an extension? A. We never had any doubt.

Q. On the 21st, you had no doubt about that; is that correct? A. Correct.

Mr. Underwood: I have no further questions.

The Court: Was it after that conversation that you had with Martell that the aformation was sent to him as to the whereabouts of the ship?

The Witness: Correct, sir, to substantiate what I had told him.

The Court: That was taken from the log?

The Witness: From the office-log, yes.

The Court: Office-log of the ship?

The Witness: Yes, sir.

Redirect Examination by Mr. Cardillo:

Q. Mr. Vatis, had Mr. Martell, in the conversation you had with him on April 21st, refused to sign the addendum flatly? A. No, sir.

Q. I show you a log-book, Bridge log-book of the vessel "Strathbay" and ask you if this is the so-called [152] rough log of the vessel "Strathbay" for the period prior to and subsequent to the charter-party in question? A. Yes, this is the vessel's log in which everything is written in pencil as it happened.

Later on it is copied into what they call the smooth log, by ink.

Mr. Cardillo: I offer this in evidence, if your Honor please.

Mr. Underwood: If your Honor please, I don't see that this log-book is material to any of the issues in the case.

The Court: How great a proportion of time does that logbook, in its entirety, cover?

The Witness: It covers close to a month, your Honor.

Mr. Cardillo: It covers from March 20th to May 17th, 1952.

The Court: Well, the immediate entries in there covering the period of time of the original charter down to and including the 10th of May might be of some materiality. That part of it might be of some materiality to substantiate what he said about the information and what Winterberger said about the information—the information that they gave to [153] Marteil, after the question was raised about where the vessel was and where it would be and whether it could be in Corpus Christi on the day in question.

I will take so much of the log as covers that period of time, from the day of the signing of the original charter-party, down to and including May 10, 1952.

Mr. Underwood: All right. That might be of some materiality. I won't object to it.

The Court: Could it be agreed between counsel that photostatic copies of that could be submitted, or do

you want to leave the entire logbook, or so much of it as I am admitting?

Mr. Underwood: I suppose that Mr. Cardillo has an itinerary of the ship; is that correct?

Mr. Cardillo: That is true.

Mr. Underwood: May I suggest then that Mr. Cardillo prepare an epitome of this which shows sailing dates and ports and arrival dates and ports, and we can substitute that for the log-book itself. We will make it much simpler and easier to see what he wants.

Mr. Cardillo: That would be satisfactory except to this extent, your Honor: The log also [154] shows the slight occurrences, or the minor occurrences that caused the delays from time to time. For that reason, I feel that your Honor's suggestion of having a photostatic copy of the logbook, say from April—

The Court: The date of the original charter down to May 10th—down to and including May 10th.

Mr. Cardillo: That would be very satisfactory.

Mr. Underwood: I have no objection to that.

The Court: Then you will submit photostatic copies of that much of that logbook.

Mr. Cardillo: Thank you, your Honor.

(The logbook above referred to was marked Libelant's Exhibit 11 in evidence.)

Mr. Cardillo: That is all, your Honor.

Mr. Underwood: No questions.

Mr. Cardillo: That is all for the Libelant at this time.

Mr. Underwood: I take it Libelant rests?

Mr. Cardillo: Yes, with this exception: I have pointed out yesterday that Captain Vatis might be called back in connection with the actual tender of the vessel. Unfortunately, he couldn't be here this morning, but if his testimony is necessary, [155] we could always put him on after Mr. Underwood's case.

James C. Martell—for Respondent—Direct

JAMES C. MARTELL, called as a witness, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Underwood:

Q. Mr. Martell, you are an officer of the Respondent in this case, Coastal Oil Company? A. Yes, sir.

Q. How long have you been employed by or connected with the Coastal Oil Company? A. Approximately nine years.

Q. What is your present capacity? A. I am Vice-President and General Manager.

Q. In March and April, 1952, what was your capacity with that company? A. I was Vice-President and General Manager at that time, also.

Q. Generally speaking, what were your duties? A. I was in complete charge of the operations of the company.

[156] Q. Did that include chartering of ships as the need arose? A. Yes.

Q. What is the business of your company? A. Wholesale marketers of petroleum products, heating-oil in particular.

Q. The oil involved in this case, was that a heating oil? A. Yes, sir.

Q. What you call No. 4? A. No. 4 heating oil.

The Court: You say you are distributors of heating oil?

The Witness: Wholesale distributors of heating oil, sir.

Q. Mr. Martell, was it you who, on behalf of Coastal, made the original charter that is involved in this lawsuit? A. Yes, it was.

Q. I show you a copy of a letter dated April 1st, 1952, which has been marked Libelant's Exhibit 4 for Identification. Will you tell me whether or not that is the covering

The Witness: No, that was on the 14th, the 13th, 14th.

The Court: Either the 13th or the 14th?

The Witness: That is right, yes. He suggested a rate of 140 if the ship arrived there by April 30th, or 120 if it arrived after the 30th, or before the 10th. He was talking about a ten-day extension, which would have carried the ship by the cancelling date, up to May 10th.

I told him that we weren't interested and the matter was dropped.

By Mr. Underwood:

Q. When was the next time it came up, as you recall? A. As I recall, around the 15th, 16th, he called again and asked if we had thought any more about the extension; that the owners were quite anxious to get an extension, that it looked very definitely to the owners that the ship would not arrive by the 30th. I told him again that we weren't interested, certainly not at that rate, but that [161] we would give it some consideration. Although there were things that we knew about that might prevent us from wanting to talk any further about any extension.

Q. What were those things, Mr. Martell? A. Well, the most important thing—I shouldn't say the "most important"—there were several things. The first thing, of course, was that tanker-rates were slipping badly, and of course, if we granted an extension, we would want a considerably lower rate than the 140 or 120, which he had offered.

Also, there was a possibility of a strike at the terminal where we were going to load this cargo of No. 4 heating oil.

Q. Did you have any oil at any other terminal than Sinclair? A. This particular type of oil?

Q. Yes. A. No, sir, we did not.

Q. The two things that loomed largest then, in your mind, were the falling market and the strike; is that right? A. That is right, yes, sir.

Q. When did the next approach come, as well as you can remember the date? [162] A. Well, we had further conversations on the 16th. The same matter was brought up again. I told him that we might consider an extension, but our proposition was USMC, plus 100, whether the ship made the April 30th cancelling date, or whether it didn't arrive until May 10th.

Mr. Winterberger told me that he had submitted that to the owners and they refused that.

Q. Did you make some other suggestion about a flexible rate; that is, a rate so much before and another rate after? A. Yes, I also suggested a rate of 120 if it arrived by the 30th and 100 if it arrived after the 30th, or before the 10th.

Q. Can you fix the time of that? A. That was approximately the same time; it might have been on the 17th.

Q. Mr. Martell, did you keep any diary or make any written notes at all of these various conversations? A. No, sir, I did not.

Q. Can you be certain, therefore, on any particular date that any of these conversations occurred, on any particular date? A. No, I cannot. The only thing I can say is approximately on these dates.

[163] Q. What was the course of negotiation, picking up at the point you left off from? A. Well, as I remember it, then Mr. Winterberger called me back and told me that the owners had definitely turned down the two offers which I had made; that is, the one where I had made 120 if it had shown up by the 30th, or 100, by the 10th. Then, also, the one at the flat 100.

Mr. Cardillo: Can we fix the time of that, Mr. Underwood?

Mr. Underwood: You may cross-examine him in due course. I think he has fixed it as well as he can.

By Mr. Underwood:

Q. What was the course of negotiations from there on, Mr. Martell?

The Court: Would your recollection be that the last conversation was on the 16th, the same day that you talked about the other things, April 15th or 16th?

The Witness: Well, your Honor, it could have been the 16th or it could have been the 17th.

The Court: It could have been the day after?

The Witness: Yes.

Q. What was the next approach? [164] A. Well, after Mr. Winterberger called me and said that they had turned it down, he renewed then his original offer of 140-120 and I told him again that we were not interested. Then he suggested that maybe he could get the owners to offer 120 whether it arrived by the 30th or whether it arrived by the 10th of May.

Q. That is a flat reduction to 120 for a ten-day extension? A. That is correct, yes, sir, whether it arrived by the 30th or it arrived by the 10th.

Q. What was your response to that? A. I said that we were definitely not interested, but that I would be glad to take it up with my superiors, some of my associates in the company, and I would call him back and let him know.

Q. What did you do? A. I talked it over with the President of our company.

Q. Who is that? A. Mr. Wyley Butler, and very possibly my assistant was present at the time. I am not sure, but I do know that I discussed it with Mr. Wyley Butler.

Q. Was some decision reached between you at that time? A. Yes.

[165] Q. What was the decision? A. The decision was that we would not accept the offer; that at the time we would not accede to the offer; that we would wait.

Q. Did you have any further conversation with Mr. Winterberger? A. Yes, Mr. Butler instructed me to call Mr. Winterberger back and tell him that we were not interested in the offer at that time.

Q. Did you do that? A. I did, sir.

Q. What was the next approach toward this business? A. Well, Mr. Winterberger called me again, I think it was approximately on the morning of the 18th, or in the forenoon of the 18th, and he asked me if we had given any further consideration to this offer. I said no, that we had not. He said that he thought we probably would, and would like to prepare an addendum covering the extension and send it out to me.

I said, "Well, Joe, that is certainly not necessary. We are not interested in this thing. I can't see what good an addendum would do us." He said, "Well, I feel quite certain you are going to accept this offer. Let me prepare it and send it out and you can take a look [166] at it."

I said, "If you want to do that, there is certainly no harm in it. I want you to understand that we turned down this offer and we have no intention of accepting it."

Q. What was the next conversation that you had on this subject with Mr. Winterberger, as you recall? A. Well, as I recall the next conversation was when the addendum arrived in the office and, I fix that date approximately around the 21st of April.

Q. Do you remember what day of the week it was? A. As I recall it, it was a Monday, yes, sir.

Q. What was the substance of that conversation? A. Well, I called Mr. Winterberger and I told him that I had received the addendum; that naturally we hadn't agreed to anything. I wasn't going to sign it, but I didn't like the looks of the addendum, anyway. Even if we had reached an agreement, I couldn't sign the addendum the way it was written.

He wanted to know why. I told him that I had heard in the trade that the "Strathbay" had been fixed for a cross-gulf trip which would consume four or five days; that if this fixture had not been made, it would have arrived earlier; that I heard it wouldn't arrive until [167] around the 8th or 9th because of the fact that it was going to take this cross-gulf trip. I was very much disturbed about it.

because we had the deadline to meet if we had granted an extension and if the strike didn't come off.

He assured me that that was not the case, that there was no cross-gulf fixture made for the ship. And, at that time I told him, too, that the progress of the vessel had been misrepresented to me; that I had heard that the vessel had encountered serious delays and that some of the dates which he was giving me were not correct.

He said that if I didn't believe him, he would be glad to call the owner and have the owner call me and reassure me. Then we got back to the other subject and he said, "I will even go so far as to allow you to put a clause in there which states that the vessel will proceed directly to Corpus Christi after discharging at New Orleans," which was the port of discharge of this cargo of molasses that he was carrying, and he said, "Would that make you feel any better?"

I said, "Certainly, we want something in there to assure us that we are going to get the vessel next if any further negotiations in connection with this thing were carried on."

[168] Q. Did you at any time say to him, in that conversation, that you agreed to an extension? A. No, sir. I told him very definitely that we had not agreed to an extension.

Q. Did you at any time say to him that you would sign the addendum if that clause were put in? A. No, I did not.

Q. What was the next thing that happened? A. Well, the next that happened—this was on the 21st—he said that we could put anything in there that we wished, as far as the vessel going directly to Corpus Christi. I said, "Well, I prefer that you work up something and call me, call my secretary and give it to her and she can type it in." He did that.

Then I received a call, as I recall, on that day, from Mr. Vatis. At that time I didn't know which Mr. Vatis it was because I didn't know they were brothers, I didn't know whether there was any difference between the two of

them. He told me that Mr. Winterberger had called him and requested that he call me to assure me that the information which they had been giving me was correct on the vessel's movements.

As I recall, he read me some information which I paid not too much attention to because I felt that I [169] had other information which was sufficient for my needs.

Q. Information on what subject? A. On the movement of the vessel.

Q. Various positions of the ship? A. That is right, a position report.

Q. Was there anything else said in that conversation with Mr. Vatis that you presently recall? A. Well, as I recall, he asked me if we were going to consider further extending the charter of the vessel? A. I said, not at that time; that we had decided not to extend it.

The Court: Who asked you that, Mr. Vatis?

The Witness: Mr. Vatis, yes, sir. I said, "No, we have decided not to extend it."

Q. What was the next conversation following that with anybody on the Strathmore side of the case? A. Well, as I recall it, I had no further talk with Mr. Vatis. The following day, it might have been the following day, it might have been two days afterwards, I recall talking to Mr. Winterberger, discussing the position of the ship, talking about the imminence of the petroleum strike down there, how anxious we were to get the ship in by the 30th.

As I recall, he again asked me what we had [170] decided to do about an extension. I again told him that we decided to do nothing at that time.

Q. Tell us now what transpired between then and the cancellation date, April 30th; did you have more conversations? A. Yes, I would say that possibly on the following day, or the day after, maybe the 23rd or the 24th, we talked back and forth about the ship's position. He no doubt told me that the ship was slipping quite badly and it didn't look

as though it was going to make it by the 30th of April. But there was always that possibility. On those occasions, he took the opportunity of asking me if we had reconsidered this extension. I said, yes, we had and we decided to do nothing about it.

Q. Did you give him any advice in those conversations about what you would do if she did not make the cancelling date on the 30th? A. Yes, I did. As I recall, towards the end of the month, it was approximately the 28th of April, I told him, in a conversation that unless the vessel made the port, Corpus Christi, within the cancelling date, that we were going to cancel the vessel.

Q. What did you do when you knew that she wouldn't make the cancelling date? [171] A. When we knew that she hadn't made the cancelling date, or wasn't going to make the cancelling date, we contacted our attorney, who was representing us at that time, and told him the circumstances, and he prepared a cancelling letter.

Q. Was that on May 1st? A. Well, I conferred with him on April 30th.

Q. That notice of cancellation was given on May 1st, was it not? A. Yes, sir, that is right.

Q. During all this time, from the middle of the month, on towards the end of April, what was the condition of the tanker market? A. Well, the tanker market was going down very, very rapidly.

Q. Was it a steady decline, or rapid and steady decline? A. Yes, it was a rapid and steady decline.

Q. Did that background condition reflect in the decision of your company about this extension; was that part of your motive? A. It was part of the motive, but of course, the dominating motive was the fact that the plant where we were [172] going to load this cargo would be on strike if the ship arrived after the cancelling date.

Q. What was your information at that time as to the imminence of the strike?

Mr. Cardillo: If your Honor please, will you fix the time, Mr. Underwood. At which time?

Q. During the latter half of April.

Mr. Cardillo: That is from the 15th on?

Q. From the 15th on to the 30th? A. Well, there was a complete disagreement between the Union and the owners. It looked very definitely as though the plant would be struck.

Q. Do you remember whether there actually was a strike? A. Yes, sir, there was a strike.

Q. Do you recall how long it lasted? A. I think it lasted twelve to fifteen days.

Q. You were in court yesterday and you heard Mr. Winterberger testify? A. Yes, sir, I did.

Q. Did you, any time, Mr. Martell, ever express an agreement to him about a ten-day extension, or any other extension of this charter? A. No, sir, I did not.

Mr. Underwood: You may cross-examine.

[173] *Cross-Examination by Mr. Cardillo:*

Q. Mr. Martell, you have testified that you did not make any agreement with Mr. Winterberger about a ten-day extension? Is that absolutely positive in your mind? A. Yes, sir, it is.

Q. There is no doubt at all but that you did not agree to extend the charter-party for ten days? A. No, sir, there is no doubt in my mind.

Q. Or to extend it at all for one day or two days? A. There never at any time was any doubt in my mind. I did not enter into any agreement to extend it beyond April 30th.

Q. How long have you been chartering vessels, Mr. Martell? A. Since 1943.

Q. I suppose if that vessel got there on May 1st, May 2nd, there would be no doubt in your mind that you could cancel the charter-party; is that right? A. Well, the cancelling date in the charter-party was April 30th.

Q. Then you knew definitely that if the vessel got there on May 1st, you could cancel it; isn't that [174] right? A. If it got there on May 1st?

Q. During the latter half of April.

Mr. Cardillo: That is from the 15th on?

Q. From the 15th on to the 30th? A. Well, there was a complete disagreement between the Union and the owners. It looked very definitely as though the plant would be struck.

Q. Do you remember whether there actually was a strike? A. Yes, sir, there was a strike.

Q. Do you recall how long it lasted? A. I think it lasted twelve to fifteen days.

Q. There is no doubt at all but that you did not agree

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Q. I suppose if that vessel got there on May 1st, May 2nd, there would be no doubt in your mind that you could cancel the charter-party; is that right? A. Well, the cancelling date in the charter-party was April 30th.

Q. Then you knew definitely that if the vessel got there on May 1st, you could cancel it, isn't that [174] right? A. If it got there on May 1st?

Q. On May 1st, yes. A. No, we couldn't have cancelled it under the terms of the charter-party.

Q. What was the cancelling date, Mr. Martell? A. Midnight, April 30th.

Q. Was it? I show you the charter-party and ask you to refresh your recollection. What was the cancelling date under the charter-party of March 27th. A. April 30, 1953.

Q. If the vessel got there on May 1st, could you have cancelled the charter-party? A. If it had arrived at 12:01 May 1st?

Q. Yes. A. No, sir, we could not.

Q. I am afraid I don't understand you. You say your cancelling date was April 30th? A. That is right.

Q. May 1st is the day after April 30th? A. That is right.

Q. If it arrived after April 30th, you could not cancel? A. Under the terms of the charter-party, cancelling-notice [175] had to go out twenty-four hours, within twenty-four hours from four o'clock on April 30th.

Q. At four o'clock on April 30th? A. Yes, sir.

Q. If the vessel arrived on May 2nd, could you have cancelled on May 30th? A. Not if we hadn't sent a cancelling notice.

Q. Assuming you had sent a cancelling notice? A. Assuming we had sent a cancelling notice, the vessel would have been cancelled.

Q. It would have been cancelled? A. As of midnight, April 30th.

Q. Is there any question about your right to do that? A. No, sir.

Q. None at all? A. No, sir.

Q. No doubt about it? A. No, sir.

Q. Did you know on April 30th that the vessel would not arrive until May 2nd? A. No, sir.

Q. How did you feel you were entitled to send a cancelling-notice out on April 30th, or May 1st? A. Because I was told that the vessel wouldn't arrive [176] by midnight, April 30th.

Q. Therefore, if it did not arrive by midnight, April 30th, you had the right to cancel? A. Correct, sir.

Q. No question about that? A. Not in my mind, no, sir.

Q. Why did you feel it necessary to consult counsel on it? A. The policy of our company.

Q. Is it the policy of your company to consult counsel even when the matter is clear-cut and you have no doubt about it? A. Yes, sir.

Q. It is, in any event? A. Yes, sir.

Q. Mr. Martell, the regular counsel of your company are Shanley & Fischer of 744 Broad Street, Newark? A. Not in maritime matters, no, sir.

Q. Well, as a matter of fact, a matter of cancelling a charter doesn't involve great maritime knowledge, does it? A. I wouldn't know that, sir.

Q. But they are your regular attorneys, aren't they? A. For certain matters, yes, sir.

Q. I show you this letter from Mr. Foley, of Foley & Staft, to Mr. Nicholas Healy of Nelson, Healy, [277] Baillie & Burke, and call your attention to the last sentence in that letter.

Will you read that please? A. "The regular attorneys for Coastal Oil, Messrs. Shanley & Fischer, 744 Broad Street, Newark, New Jersey, will accept service and appear."

Mr. Underwood: May we have the paper marked for Identification, and may I see it?

Q. But you still felt you had to consult special counsel in the matter, did you not? A. Yes, sir.

(The document above referred to was marked Libelant's Exhibit 12 for Identification.)

By Mr. Cardillo:

Q. Mr. Martell, on your direct testimony, in answer to a question from Mr. Underwood as to when you first dis-

cussed an extension with Mr. Winterberger, you said that it was about April 10th, is that correct? A. Yes, sir.

Q. Do you recall that in your deposition taken on November 4, 1955, I asked you these questions, and you made these answers:

"Question: Do you recall if you called Mr. Winterberger, or if he called you?

[178] "Answer: As I recall, he called me.

"Question: What did he say to you in that conversation?

"Answer: Well, he talked about the position of the ship.

"Question: Is that all he said?

"Answer: The "Strathbay", as I recall, that was the gist of the conversation.

"Question: Just what did he say about the position of the ship?

"Answer: It seems that the ship at that time was losing some time and he wanted to bring me up-to-date on the thing, that it wasn't going to arrive down there around the readiness date indicated in the charter-party, which I think was the 22nd of April.

"Question: That was about April 10th?

"Answer: I would say that was around April 10th, as near as I can fix the date.

"Question: Did he say anything else to you in that conversation?

"Answer: I don't recall that he did. No, sir."

Do you want to change your testimony now? A. No, sir.

[179] Q. You do say now that he first requested an extension about April 10th; is that right? A. No, I don't believe that I said that. I said he brought me up-to-date.

Q. That is what you said in your deposition. I know that, Mr. Martell.

Mr. Underwood: Let him finish, please.

Q. I am talking about your direct testimony. A. If I recall my direct testimony, I said—

The Court: Here, today, he is talking about, Mr. Mr. Martell.

The Witness: Yes, I understand that, sir. I said that I thought that the conversation which Mr. Winterberger had with me, he brought me up to date on the position of the ship that was preliminary to asking for an extension.

The Court: He testified today that on his testimony of April 10th, there was no talk of extension, if I remember correctly.

Mr. Underwood: Yes, sir, that is correct.

Mr. Cardillo: Then my recollection is incorrect, your Honor.

The Court: He said there was no talk of extension. He testified, as I recall, today, substantially [180] what he said in his examination before trial.

Mr. Cardillo: My recollection was that in answer to a question from Mr. Underwood as to when he first requested an extension, he said it was April 10th. I obviously am in error, your Honor.

The Court: According to my recollection; you are.

By Mr. Cardillo:

Q. You also stated, in your testimony early today, that on the 13th or 14th, in answer to a question from Mr. Underwood about an extension, you said that you just weren't interested. Then you added, as I recall, that there was a suggestion by Mr. Winterberger after you said that you might consider it if there were adequate consideration about a reduction in rate from USMC 190 to USMC 140, if the vessel arrived by her cancelling date, and further to be reduced to USMC 120, if it arrived after her cancelling date; is that correct? A. Yes.

Q. Do you recall, Mr. Martell, that in your deposition, you stated on Pages 29 and 30, and I quote:

"Question: You stated, as I understand, Mr. Martell, that on or about the 13th or 14th you had a conversation with Mr. Winterberger wherein he requested [181] for the first time an extension of the cancelling date on that charter-party; is that correct?

"Answer: I did not say that he requested it. I said he brought up the matter of an extension.

"Question: What was the period he requested at that date?

"Answer: He asked me if we would consider an extension of ten days beyond the cancelling date of the charter party.

"Question: What did you tell him in that respect?

"Answer: I told him that we might consider it."

Mr. Underwood: Will you read the next question and answer too, please?

Mr. Cardillo: (Continuing reading):

"Question: Was that all that was said in that conversation?

"Answer: As I recall it, yes. Well, I might have said this: I said, 'If we do consider it, naturally we would want some consideration on our part, possibly a lower rate, if we extend it by any period at all'."

Was there any other consideration you had in mind besides the lower rate? [182] A. No, sir.

Q. You did tell Mr. Winterberger then that you would consider it when he brought it up? A. Yes, sir.

Q. That you were interested, in other words? A. I didn't say so.

Q. You told him that you would consider it? A. Well, yes.

Mr. Underwood: The word is "might consider".

Mr. Cardillo: I don't think it makes any difference, Mr. Underwood.

Q. You say that on or about the 15th of April you had discussed this matter with the officers in your company and

the factors which would influence you in not considering it was the falling market and strike? A. Yes, sir.

Q. Were they equally important? A. I would say the strike was more important.

Q. In other words, you felt that if the strike was imminent, it would be foolhardy for you to grant any extension; is that right? A. Yes, sir.

Q. In your deposition—and I refer to the bottom of Page 30 and the top of Page 31, Mr. Martell—in [183] referring to the conversation of April 15th, I asked the following questions and you made the following answers:

"Question: What did he say in that conversation?"

Mr. Underwood: I dislike to interrupt, but doesn't that refer back to a conversation of the 13th or 14th, rather than the 15th?

Mr. Cardillo: No. If you look on Page 31, Mr. Underwood, you will see that he states it was the 15th.

Mr. Underwood: Yes, thank you.

Mr. Cardillo: (Continued reading):

"Question: What did he say in that conversation?

"Answer: Well, to the best of my recollection, he said it looked now as though they would want an extension because they were having difficulties discharging one of the previous cargoes. And, as I recall, he said that if we would extend that, they would consider a lower rate.

"Question: Did he indicate what rate?

"Answer: I think it was around 140 USMC plus 140. Now, the documents bear the thing out there somewhere.

"Question: Will you show me which document you refer to?

"Answer: Well, maybe I am wrong. You may strike [184] it out.

"Question: Don't strike it out. I would like to know which document you referred to.

"Answer: I guess I am mistaken. There are no documents that I can recall that did contain it, because the offer was never made in writing.

"Question: And the best recollection you have as to the date of that conversation was about April 15th?

"Answer: April 15th."

Are you sure now, Mr. Marfell, that there was 140 if makes and 120 if misses, or was it straight 140? A. I am pretty sure it was 140 if it makes and 120 if it misses.

Q. Then the testimony in your deposition was erroneous? A. I could have been mistaken, yes, sir.

Q. You have also testified, as I recall, that you made an offer on or about April 17th to Mr. Winterberger? A. Yes, sir.

Q. The substance of that offer was that you would agree to a ten-day extension in consideration for a reduction of the rate from USMC plus 130, to 120, if the vessel arrived at the loading port by April 30th, and [185] further to be reduced to USMC plus 100 if it did not arrive before May 10th; is that correct? A. Yes, sir.

Q. That was on April 17th? A. As closely as I can fix the date, yes, sir.

Q. You were aware of the strike at that time, Mr. Martell, weren't you? A. Yes, sir.

Q. Wasn't there great concern in your mind that if you went on strike, or if the plant went on strike, you would have the vessel there on demurrage? A. Yes, sir.

Q. Wasn't that the very reason why you wouldn't consider any of the offers from Mr. Winterberger? A. Yes, sir.

Q. Yet, you still made a counter-offer? A. Yes, sir.

Q. But it didn't bother you in connection with your counter offer, did it? A. Yes, it did.

Q. To what extent? Why did you make it then? A. Well we are business people. We thought it might be a businessman's gamble. There was still a possibility that the strike would have been settled prior to April 30.

[186] Q. There was a possibility that it could have been settled prior to April 30th? A. There is always a possibility that a strike can be settled before the deadline.

Q. As a matter of fact, isn't there always a possibility that the time of strike is often extended while negotiations are proceeding, in a labor dispute? A. Yes, that is a possibility.

Q. Sometimes it is extended for as long as a week, or a month; isn't that so? A. That is correct.

Q. Do you know whether that possibility existed here? A. No, I do not.

Q. But it might have, is that right? A. It might have, yes, sir.

Q. If you had an acceptance of your offer which would result in a reduction of the rate from USMC plus 180 to USMC plus 120, it would have been very good business, would it not? A. It would have been good business?

Q. Yes. A. If the strike hadn't been called, it would have been good business.

[187] Q. If you had a proposal of USMC 120 on April 18th and the strike hadn't been called, would it have been good business? A. Yes, sir.

Q. But you felt that the distinction between April 17th and 18th was that if the vessel got there after April 30th, you should have an additional reduction of 20 points; is that correct? A. That is right.

Q. That is what made it bad business; that is, that is what made the straight 120 bad business; is that right? A. No, I wouldn't say so.

Q. What did make it bad business? A. To take the 120?

Q. Yes. A. The same thing that would have made it bad business at 190. If the strike would have been called we would have been on demurrage.

Q. But it was good business if you got the 120 by April 30th and 100 by May 10th? A. If the strike hadn't been called.

Q. That is right, if the strike hadn't been called, it would have been good business to take it at 120, would [188] it not? A. That is a matter of opinion. Let's say it was a businessman's gamble rather than good or bad business.

Q. Was it an interesting gamble? A. I would say so.

Q. Would you have considered it? A. Well, we were willing to consider it if we were willing to make the offer, yes, sir.

Q. Mr. Martell, I call your attention to your testimony as set forth on the deposition—I refer to Page 41—this relates to a conversation had on April 16th, and in answer to the following questions, you made the following answers:

"Question: Did you then speak to your superior?

"Answer: At an appropriate time I discussed the matter with Mr. Butler, and we decided at that time not to do anything further.

"Question, when you say 'not to do anything further', just what do you mean, Mr. Martell?

"Answer: When I say 'not to do anything further', I mean that we decided not to act on any extension of the charter-party nor consider the offer that had been made to us.

[189] "Question: And you referred to the same offer that had been made the day before; is that correct?

"Answer: I referred to the offer that Mr. Winterberger made, yes.

"Question: The day before?

"Answer: That is right.

"Question: What were the terms of that offer, again?

"Answer: USMC plus 120.

"Question: As the rate for a ten-day extension?

"Answer: That is right."

Do you still say that on the 17th it would have been interesting to you to offer 120 if the vessel arrived by April

30th, and 100 if by May 10th? A. I don't understand that. Read that back, please.

(Pending question read by the reporter.)

Mr. Underwood: If your Honor please, I hesitate to object to the form of the question on cross-examination, but the word "interesting" puzzles me. If it means would his company be interested, that I could understand.

Mr. Cardillo: Well, he stated in his testimony—

The Court: I think he is referring back to a previous answer that the witness made, that the offer [190] he claims he gave to Winterberger was interesting. I may be wrong about that.

Mr. Cardillo: That is correct, your Honor.

Mr. Underwood: I don't make any objection, I am just a little unclear in my own mind as to just what "interesting" means.

A. I don't think I can answer that yes or no. May I just explain something?

Q. Certainly, go ahead. A. I would say this, that the type of business that we operate, we are interested in most anything that is profitable to us. Whether this particular thing would have turned out to be profitable, I don't know. But, we are interested in listening to what anybody has to say to us until we make up our minds that we are definitely not.

Q. Until you make up your mind that you are definitely what? A. Definitely not interested.

Q. Once you make up your mind that you are definitely not interested, you wouldn't consider anything farther? A. No, I don't say that. We would reconsider. There are times we turn down something in the morning, and probably two hours later our consideration changes.

[191] The Court: Isn't it a fact, Mr. Martell, that the market for fuel oil in the months of March and April and May has always gone down, each year?

The Witness: As a rule, it is, yes, sir. You are getting into the warmer season and you have to reduce the prices.

The Court: That has been your experience with Coastal Oil?

The Witness: That is correct.

Mr. Cardillo: Excuse me. Does your Honor refer to the freight rates?

The Court: No, he says that one of the things that caused him concern about the cancellation, that gave him trouble, was the fact that prices had been going steadily down.

The Witness: No, tanker-rates.

The Court: Tanker-rates going steadily down, together with the possibility of the strike.

The Witness: Tanker-rates reflect in the prices of the product.

The Court: That is what I mean. All right, proceed.

By Mr. Cardillo:

Q. I refer you again to your deposition, Mr. Martell, [192] and in addition to the testimony which I read from Page 41, in which you advised Mr. Winterberger that you would not consider the offer, on Pages 43 and 44, in answer to these questions, your made the following answers:

"Question: What did your conversation with Mr. Butler consist of?

"Answer: I went in and told him that I had received this call from Mr. Winterberger and that the owners were a little bit doubtful as to whether or not the ship was going to arrive prior to the cancelling date. They were still anxious to perform and felt, as a matter of insurance, that they would like a ten-day extension, and they had renewed their offer which was 120, and so forth and so on.

"Question: What did Mr. Butler say?

"Answer: Well, we discussed pros and cons in connection with that business, and he said, 'How do you feel about it?' and I said, 'I think it is an offer that we have to reject.' And he said, 'I agree with you.' And I said, 'Well, I will go back and call Mr. Winterberger and tell him that we can't accept it'."

On Page 45—I will have to go back to 44, in answer to the following questions, you made the [193] following answers:

"Question: Did you telephone Mr. Winterberger then?

"Answer: Yes, I went back into my own office and called Mr. Winterberger and told him the decision that we had made.

"Question: What did he say?

"Answer: He said that the owners were still quite anxious to get this extension, and he would like to get an addendum to the charter-party, would like us to give it further consideration, not to turn it down then, and that he had felt so sure that we would accept it that he was going ahead and preparing an addendum and send it out for us to look at. I said, 'Well, I see no point in that because we have no intention. We do not feel that it is good business judgment on our part to extend this thing, and I see no point in you sending the addendum out. But, if you want to do it, go ahead and we will take a look at it'."

Do you recall giving that testimony? A. In the deposition, yes, sir.

Q. Mr. Martell, this morning, in answer to questions from Mr. Underwood, when you were referring to the conversation in which Mr. Winterberger said, or said he would [194] send you an addendum, you testified essentially that you told him, "I want you to understand that I have no

intention of accepting it and see no point in your sending it out."

Actually, which is the correct version, Mr. Martell; the one you made here in court, or this one? A. I don't think it makes a whole lot of difference.

Q. Well, it does to me, Mr. Martell. A. Well, Mr. Cardillo, may I say this: This action took place about four years ago. It is pretty difficult to remember the exact conversation. I would say that the intention conveyed in both conversations is the same.

The Court: We will take a five minute recess.

(Short recess.)

By Mr. Cardillo:

Q. Mr. Martell, you testified that you had a conversation with Mr. Vatis on the 21st of April, 1952? A. Yes, sir.

Q. In your deposition, and I refer to Pages 49 and 50, and particularly on Page 50—you referred to the date of that as being April 18th. I will read from your deposition, commencing at Page 49, where you made the following answers to the following questions:

"Question: What was the substance of your con-
[195] versation with him?

"Answer: He called me and told me that he had been talking with Mr. Winterberger and he went into some of the difficulties that they have encountered in discharging this molasses out in Cuba and Puerto Rico, and why the ship was late. He said that the information that Mr. Winterberger had been giving us was coming from an office log and it could vary one or two days with the actual log of the vessel; and, as I recall, he also asked if we wouldn't again consider the extension because the ship was going to be pretty close to the line there, and he thought we should give it further consideration.

"I thanked him for calling and told him that at the present time we were not considering any extension at all.

"Question: Was this the 18th or the 19th?

"Answer: No, I would say that was the same day, the 18th.

"Question: The 18th?

"Answer: Yes.

"Question: Was that the substance of your conversation?

[196] "Answer: Yes, it was.

"Question: You say Mr. A. T. Vatis stated that Mr. Winterberger was giving you information from the office-log?

"Answer: Yes.

"Question: Did you have any other conversation with Mr. Vatis in that particular regard; that is, with regard to the office-log?

"Answer: No, not that I recall."

Mr. Martell, do you change the date of that conversation from the 18th to the 21st? A. Mr. Cardillo, as I said, the dates that I gave you at that time and the dates I am giving you this morning are approximate. I have no written memoranda. I can't place the dates exactly. It might have been the 18th, rather than the 21st.

Q. Mr. Martell, you testified in your deposition, on Page 46 and 47 with regard to a conversation you had with Mr. Winterberger on the 18th of April, and you gave the following answers in answer to the following questions:

"Question: What was said in that conversation?

"Answer: Well, I called him to check on the ship's position. I had heard somewhere, I got some information [197] through the trade that the vessel was slipping quite badly and there was no possibility of it arriving down there on the 22nd or the 23rd, or even before the

cancelling date. I wanted to check with him and find out if that was true."

Did you know then, on April 18th, that the vessel could not conceivably arrive by the cancelling date? A. Positively? No, sir.

Q. But you had reason to believe that it might not arrive by April 18th? A. April 22nd.

Q. April 30th? A. That is correct, yes.

Q. You also stated this morning, Mr. Martell, that you told Mr. Vatis on April 21st that you decided not to extend the cancelling date; is that correct? A. Yes, sir.

Q. And that when Mr. Winterberger sent you the addendum, you thought you would consider it? A. Yes, sir.

Q. Despite your decision not to extend it? A. Well, as I told you, a company like ours can make a decision one minute, and five minutes later, change their minds.

[198] Q. You stated that when I received the addendum, Mr. Martell, you told Mr. Winterberger that you were very much disturbed if you had granted an extension. Was there any doubt in your mind about having granted an extension? A. Doubt in my mind?

Q. Yes. A. Why, I know positively we hadn't granted an extension.

Q. And there was no reason to be disturbed? A. I don't think I said I was disturbed about any extension.

Q. I have written down your testimony as you gave it this morning. You said—

Mr. Underwood: Is Mr. Cardillo testifying? I object to the form.

The Court: You may ask him did he say that this morning.

Q. Did you say this morning that when you received the addendum, "We were very much disturbed if we had granted an extension"? A. I don't recall that I did, sir. No, sir.

Q. If you had granted an extension, you had cause for concern, did you not? [199] A. If we had granted an extension?

Q. Yes. A. Why would I have any cause for concern?

Q. Because of the strike. A. I know, but we would have taken that into consideration before we granted an extension.

Q. However, if you had granted the extension, Mr. Martell, and the vessel appeared at the port and there was a strike, you would have to pay demurrage, would you not?

Mr. Underwood: If your Honor please, I hesitate to object, but this is quite speculative and it asks the witness to assume a hypothesis that is hardly fair to assume.

The Court: I will let him answer that question because there was some testimony that there was imminence of a strike.

A. I think I answered that question.

Q. No, you did not. A. Yes, we would have had to pay demurrage.

Q. Have you any idea how much the demurrage would be? A. At the USMC rate of 190?

Q. Or 120, either figure, if you can tell me roughly. [200] A. At 190, it would amount roughly to $5,000 a day for 24 hours a day.

Q. About $40,000 a week; is that right? A. Yes, between $35,000 and $40,000 a week.

Q. And at 120? A. At 120, I would say probably $3,500 a day. I am just guessing now. I haven't figured it out.

Q. I am just asking you for a rough estimate. A. Yes, about $22,000, $23,000 a week, a very considerable sum.

Q. Very considerable, is it not? A. Yes, sir.

Q. When you received the addendum, Mr. Martell, knowing that the vessel was behind schedule and knowing that the market rates had slipped very badly, you should have been delighted that the vessel might not arrive by April 30th; isn't that so? Will you repeat that question?

(Pending question read by the reporter.)

A. I can't answer that yes or no. I would have to say I don't know why I should be delighted one way or the other.

Q. Well, if the vessel could not make the April 30th cancelling date, you could cancel, could you not? [201] A. Yes, under the terms of the charter, we had the right to cancel, yes, sir.

Q. And the market rates were much lower, were they not? A. Yes, sir, that is correct.

Q. So that it would have been greatly to your advantage not to grant an extension? A. That was one reason why we didn't grant an extension.

Q. Not even consider it? A. I wouldn't say that, no. You consider a lot of things. As I said before, we have a flexible business. We do a lot of considering of matters that come up.

Q. Now, again, this morning, when you testified to having received the addendum, you stated that you telephoned Mr. Winterberger and told him that "We definitely have not agreed to an extension." Isn't that correct? A. Yes, sir.

Q. I refer to your deposition on Page 52, and you stated at that time, in answer to the following question, referring to your conversation with Mr. Winterberger on receipt of the addendum— A. What was the date of that, sir?

Q. April 21st:

[202] "Question: What was the substance of your conversation at that time?

"Answer: Well, I called Mr. Winterberger and said that we had received the addendum. I said—as you recall, we haven't accepted your offer nor have we granted you an extension, but, I said, in looking over this addendum, before we would even consider accepting anything, we would want some changes made in this addendum; because, I said, I heard that there was

a possibility that the vessel, after its last port of discharge, which I recall was New Orleans, might not proceed directly to Corpus Christi."

Isn't that an unusual way, Mr. Martell, to open a conversation when you receive an addendum? A. An unusual way?

Q. Yes. A. No, sir, I don't believe so.

Q. Mr. Martell, I show you Libelant's Exhibit 3, which is a copy of the addendum. Does that correctly reflect the addendum as you received it? A. Yes, sir.

Q. Now, I show you respondent's Exhibit A. Is that the actual copy of the addendum you received? A. Well, I can't say definitely. It is marked "original". [203] It might be.

Q. Do you notice the matter that has been inserted? A. Yes, sir, I do.

Q. Did you cause that to be typed up in your office? A. I caused it to be typed in one of these addendum forms, yes, sir.

Q. When you received this, that matter was not in it; is that correct? A. That is correct, it was not.

Q. But in all other respects, this is exactly as you received it? A. Yes, sir.

Q. It was signed by Strathmore Shipping Company, was it not? A. That is correct.

Q. Mr. Martell, you have testified that you returned the charter-party when it was signed, within three or four days. Did you ever return this? A. No, sir.

The Court: Referring to what now?

Mr. Cardillo: Respondent's Exhibit A, the addendum.

Q. You did not return it? A. No, sir, I did not return the addendum.

Q. But it was a signed document, was it not? [204] A. It was signed by Strathmore Shipping Company, yes, sir.

Q. It gave you, in effect, a triple-edged sword, didn't it, Mr. Martell? In other words, if the vessel got down there before April 30th, all you had to do was sign the addendum and you automatically had your rate reduced from 190 to 120? A. I wouldn't say so, no, sir.

Q. If it got there after April 30th and there was no strike, all you had to do was sign it and you automatically had your rate reduced from 190 to 120, didn't you? A. No, sir.

Q. If it didn't get there by April 30th, and there was a strike, all you had to do was to refuse to sign it, deny that you made the agreement and could cancel the charter-party, wasn't that the effect of it? A. No, sir.

Q. What is your interpretation of the effect? A. Well, in view of the fact that there never was any understanding between us—the company or myself never agreed to any extension,—it had no more effect than any other piece of paper that comes to the office.

Q. Despite the fact that it was an original and was signed by Strathmore Shipping? [205] A. That is right.

Q. Didn't you feel an obligation, in view of the fact that you had decided not to grant the extension, to return this document? A. No, sir, I did not.

Q. If the vessel had tendered prior to April 30th, without that document, and a strike had gone on and you were not able to load, your demurrage would have been approximately $40,000 a week, as you have just testified? A. Approximately $40,000 a week, yes, sir.

Q. If it got there after April 30th, and there was a strike, the demurrage would have been approximately $30,000 a week, let us say; is that correct? A. You mean if the rate had been reduced, don't you?

Q. Yes. A. If the rate had been reduced and we had granted an extension.

Q. But if you hadn't granted an extension, you wouldn't have to pay a penny. A. If we hadn't granted an extension and we had cancelled the charter as we did, no, sir.

Q. As a matter of fact, the only risk you ran, Mr. Martell, was to deny that you made an agreement and take your chances in court, and at best, pay damages [206] which in no event would exceed $50,000; isn't that so? A. No, that is not so. May I amplify on that slightly?

Q. Yes. A. There is no point in denying something that never existed.

Q. If it never existed, Mr. Martell— A. Which it didn't.

Q. That is your testimony? A. That is correct, sir.

Q. Mr. Martell, with regard to this insertion, you state that the purpose of this was to assure—and I refer to the insertion on the addendum—to assure that the vessel would not make a cross Gulf trip; is that right? A. That is correct. Well, to insure us that the vessel, if we had agreed, or would agree to an extension, would come directly to us from its last discharge port.

Q. If the vessel made a cross-Gulf trip, Mr. Martell, it couldn't conceivably have arrived by April 30th, could it? A. No, sir.

Q. Do you know what the market rate was at about that time? A. At about what time, Mr. Cardillo?

[207] Q. At about the time you got the addendum, or discussed it with Mr. Winterberger, the 23rd or 22nd of April. A. Well, I don't know exactly, but if we were discussing 120, 100, it must have been around that rate.

Q. Did you make any charters at about that time, Mr. Martell? A. At about what time, Mr. Cardillo?

Q. At about the 23rd, 22nd, 24th, 25th, any time that week? A. Yes, as I recall it, we made another charter for a later listing.

Q. Do you recall what the rate was? A. During the latter part of April.

Q. Do you recall what the rate was? A. Yes, the rate was, I think it was USMC plus 55 for a May loading, late May loading.

Q. Mr. Martell, I show you a photostatic copy of a charter-party dated April 25th, between Continental Oil

Company, as owners of the vessel "Conoco Lake Charles", and Coastal Oil Company, as charterer, and ask you if that reflects the charter-agreement to which you refer? A. Yes, it does.

Mr. Cardillo: I offer this in evidence, if your [208] Honor please.

Mr. Underwood: If your Honor please, I don't think it is material, but I won't object to it. I suggest that the original from which the photostat was made be used because it is easier to read.

The Court: All right.

(The document above referred to was marked in evidence as Libelant's Exhibit No. 12.)

The Court: What is the date of that?

The Clerk: April 25, 1952.

The Court: Continental Oil?

The Witness: Continental Oil Company, yes, sir.

By Mr. Cardillo:

Q. Mr. Martell, I show you a photostatic copy of a charter-party ostensibly made between Strathmore Shipping Company and Pure Oil Company, and apparently signed. I ask you if you will just examine that. A. (Witness complies.)

Q. Will you state the date of that charter? A. April 24, 1952.

Q. I also show you another charter-party between the Strathmore Shipping Company and the City of Jacksonville, Florida, and ask you if you will be good enough to look at that? [209] A. (Witness complies) April 24, 1952.

Q. After having looked at these charter-parties and the one which your company made with Continental Oil Company, is your recollection refreshed as to what the tanker-rate was at that period? A. No, sir, it is not.

Q. Would you have paid above the normal tanker-rate in making a charter? A. Well, as I said, the "Conoco Lake Charles" charter at plus 55, was made for loading on the

23rd or 24th of May. What are the dates on those? You didn't give me a chance to look at that.

Q. Examine them as much as you want to. You might also examine the rates. A. (Witness complies.)

Q. You say the charter-party that you made with Continental Oil Company was for loading at the 24th of May? A. Approximately, the 23rd, 24th of May, as I recall, after looking at it here.

Q. Would the rate you paid under that charter reflect the rates for loading at that time?. In other words, a month hence? A. Of course, yes, they would.

[210] Q. That would be the normal market rate at that time, would it not? A. That would, yes, be the asking rate at that time. At the time you were to load the vessel, not at the time you made the fixture.

Q. Would you know on the 24th of April what the rate would be on the 24th of May? A. I wouldn't know, but the owners would know what they wished to expect for a voyage on that date, yes, sir.

Q. What is the normal loading period, Mr. Martell? In other words, how long in advance do you try to fix a vessel? A. May I speak from experience?

Q. Of course. A. Depending on market conditions. Sometimes you are fixing as long as thirty days in advance; sometimes you might not fix until four or five days in advance. Sometimes ten days in advance, depending on market conditions, and your needs, and the number of ships available. It varies; it is a matter of business judgment.

Q. Mr. Martell, I call your attention to the following questions and answers given on your deposition, prior to this trial—I refer to Page 12:

"Question: You state that the conversations would [211] have taken place between the 5th and 10th of March? What causes you to believe they were at that particular time?

"Answer: Nothing in particular, except, as I said, if we wanted a ship for loading by the middle of April,

we would start talking about an offer from some broker early in the month of March, probably between the 5th and the 10th. It might have been between the 5th and the 15th, but the earlier in the month, the better chance we had of getting the ship for April loading."

That testimony is still correct, is it not? A. Yes, it is.

Q. In other words, you normally would fix about a month or so in advance. A. Of course, the word "normally" can mean a lot of things. Let us say that under average conditions, rather than normally.

Q. When you fix under average conditions, you are paying the rate which is then current for loading in about a month, or approximately a month, or two months, or thereabouts; is that correct? A. That would be correct, yes.

Q. Again, Mr. Martell, I ask you, after considering [212] the three charter-parties, or copies of the charter-parties which I showed to you, can you tell me what the current market was during the week of April 21st, 1952? A. I still say no, I cannot.

Q. For loading in May, if I limit my question for loading in May, would that help you? A. I think you would have to define whether it was the first half of May or the second half of May.

Q. Let us say the middle of May. A. You can't do it that way because usually the rates depend on the first ten or fifteen days of the month, unless they are going up very rapidly, or dropping very rapidly.

Q. Mr. Martell, do I understand you to say that if I wanted to charter a vessel today, which is the 26th of April, if I wanted the vessel say the last half of May, I would have to pay a different rate than if I wanted it the first part of June? A. You might, yes, sir.

Q. Would I normally? A. I don't think you can answer that yes or no.

Q. Well, I am asking you what the normal condition is. Do they always vary? A. Well, now, there, again, that is

a difficult thing [213] to say,—"always" can cover a lot of things.

I would say that the tanker-market has its ups and downs. It is very erratic. It is like the stock-market.

Q. That is true, the tanker-market today may be plus 50, and next month it may be minus 50; isn't that so? A. That is right, yes, sir.

Q. But if your fix a vessel today at plus 50, it would be plus 50 whether the loading was at the end of May or the early part of June? A. Are you talking about a specific charter now?

Q. I am talking about the market generally. A. No, it would not, not necessarily.

Q. Do you know what the market is today for tankers? A. I know what it was the day before I came to court.

Q. What was it? A. Tankers north of Hatteras were USMC plus 100; today they may possibly be USMC plus 125.

Q. There is a steady incline, then, in the market, is there not? A. That is correct. That, I may add is contrary to your so-called "normal".

Q. How is that? A. I say that is contrary to any so called "normal" that you speak of.

[214] Q. For the incline? A. Yes, sir.

Q. At this time of the year?

The Court: Is that what you mean?

The Witness: Yes.

Q. Yes, there is no question about that, Mr. Martell. A. So the thing can happen any time of the year.

Q. As a matter of fact, in 1952, the market was steadily declining, was it not? A. During the month of April, as I recall it, it was declining.

Q. Did you offer to charter the vessel "Strathbay" for a second voyage? A. No, sir, I did not.

Q. At no time? A. At no time, no, sir.

Q. You never even discussed the possibility of a second voyage on the vessel "Strathbay" at the time you were fixing the charter of March 27th? A. The matter might have been mentioned to me by the broker, but it was never considered seriously by us. It was just conversation if it was discussed at all.

Q. As a matter of fact, Mr. Martell, in your deposition, prior to this trial, you similarly testified [215] did you not—I refer to Page 70—where, in answer to the following question, you gave the following answer:

> "Question: Did you ever have a conversation with Mr. Winterberger, with regard to a further charter of this vessel after the completion of the present charter under discussion?
>
> "Answer: Oh, in the early stages, we were negotiating the original charter, he had said that the vessel was available in case we wanted a consecutive voyage, but at that time we weren't interested because we didn't have any material."

You never discussed again, Mr. Martell, with Mr. Winterberger, or anyone else, the possibility of a second voyage on the "Strathbay"?

> Mr. Underwood: If your Honor please, I object to the form of the question, because having read the question and answer from Page 70, which he did, Mr. Cardillo's question is essentially ambiguous. The question which he read from the deposition referred to a consecutive voyage, whereas, the question Mr. Cardillo put after having read from the deposition, refers to a second voyage. That is one not necessarily consecutive, and in the tanker-business, there is a big difference. I think Mr. Cardillo might clarify [216] his question as to whether or not he is now talking about a consecutive voyage or a second, non-consecutive voyage.
>
> The Court: Any other voyage?

Q. Any other voyage in respect to the "Strathbay"? A. I did not talk to Mr. Winterberger or anybody else about the "Strathbay". Now, it is very possible that Mr. Winterberger may have mentioned it, because it is not uncommon for brokers to talk about ships that they have available for fixtures.

Q. Have you ever discussed with anyone in your office the possibility of a second or a subsequent voyage, or a consecutive voyage of the vessel "Strathbay"? A. No, sir.

Q. Did you ever offer to charter the vessel "Strathbay" on or about April 23rd, at USMC plus 35? A. No, sir.

Q. If you could have chartered it at USMC 35, would you have done so? A. That is pretty difficult to answer at this time.

Q. To the best of your ability, will you try to answer that? A. I would say no, sir.

Q. Any particular reason? [217] A. Well, of course, based on the information you have given me, you are talking about a consecutive voyage or another voyage?

Q. A consecutive voyage. A. What date are you talking about? A consecutive voyage?

Q. Yes, a vessel to load about May 18th, 19th or 20th.

The Court: By that, do you mean—

Q. 1952.

The Court: But, do you mean by consecutive voyage, a voyage following the one that it would have taken had the charter-party been exercised?

Mr. Cardillo: Yes, your Honor.

A. Of course, you wouldn't have a readiness date the 18th or 19th, if the vessel had loaded within its cancelling date. You would have an early readiness date.

We haven't—we wouldn't have had the product, anyway. I would say no.

Mr. Underwood: By that, you mean you wouldn't have had the oil there?

The Witness: We wouldn't have had a cargo for another Liberty Ship at that time.

Q. At which time?

The Court: April, 1952?

[218] A. You are talking about April 19th?

Q. Yes. How long would a voyage have taken, Mr. Martell, assuming that the "Strathbay" had tendered under your charter of April 30th? A. I heard testimony given that it would take eighteen or nineteen days. In my judgment, a "Liberty" can make a complete turn-around in about fifteen, sixteen days.

The Court: That is to come up from Corpus Christi, deliver the oil up here and go back to Corpus Christi again?

The Witness: Yes, sir.

By Mr. Cardillo:

Q. Have you ever been a vessel-operator? A. Would you clarify that, please?

Q. Have you ever operated any vessel, Mr. Martell? A. Well, my company has owned tankers, yes.

Q. Have you personally operated them? Has your company operated them? A. No, we had management operators, but we oversaw what they did.

Q. In other words, you got someone else to operate them for you, is that it? A. That is correct.

Q. Did you ever discuss with anyone else in your [219] company the possibility of a further charter of the vessel "Strathbay"? A. Not that I recall, no, sir.

Q. Who would you normally discuss these things in your company with, if you did discuss anything? A. I would discuss them with Mr. Butler, who is President of our Company, or Mr. Robert Marron, who is my assistant.

Q. Mr. Martell, I would like to call your attention to certain questions put to Mr. Robert Marron on a deposition

taken on November 16th, 1955. I refer to Page 13, at the bottom of the page:

"Question: Were you aware of any negotiations or conversations conducted toward a subsequent charter of the same vessel?

"Answer: General conversations only?

"Question: Between whom were those conversations?

"Answer: Between the officers in our company, Mr. Martell, Mr. Butler and I. I believe we had conversations about that charter party that I partook in."

Now, I refer again to Page 15, from the middle of it:

"Question: That is not what I asked, Mr. Marron. [220] I am asking you whether you were aware of any conversation which Mr. Martell had with the owners of the "Strathbay" or the representatives or broker in or about April of 1952, with regard to the possibility of chartering the "Strathbay" for a voyage to be commenced after the completion of the voyage contemplated by the charter of March 27th?

"Answer: I did not participate in any conversation pertaining to what you are talking about.

"Question: Were you aware of any such conversations?

"Answer: Conversations between the two parties involved?

"Question: Yes.

"Answer: Not specifically.

"Question: Generally, were you aware?

"Answer: Generally I knew there were conversations between them and I don't recall at this time any specific points that might have been passed on to me."

In light of that, Mr. Martell, do you want to change your testimony about never considering a charter of the vessel "Strathbay"? A. No, sir.

Q. In other words, Mr. Marron was mistaken, is that [221] it?

Mr. Underwood: If your Honor please, Mr. Marron's deposition is not before the court.

Mr. Cardillo: It is on file in the court.

Mr. Underwood: It hasn't been offered in evidence.

The Court: If you are asking for this man to characterize what somebody else said—he said, in answer to your question, that he did not have any conversation about a further voyage of the "Strathbay", is that right?

The Witness: That is correct, yes, sir.

The Court: You are asking him to characterize another witness's testimony. That would be all right if it was his testimony. You are asking for a characterization by this witness of somebody else's testimony.

Mr. Cardillo: Mr. Martell testified that he never discussed the matter with anyone in his company.

The Court: He said now that he never did, either. He said there was no conversation about that. He hasn't changed on that.

We will recess now until 2:15.

(Whereupon, at 1:00 o'clock p.m., the Court took a recess until 2:15 p.m.)

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[222] (Afternoon Session)

2:15 p.m.

Same Appearances.

James C. Martell, recalled as a witness, resumed the stand and was examined and testified further as follows:

Cross-Examination (Continued) by Mr. Cardillo:

Q. Mr. Martell, in the week of April 21st, 1952, were the rates as high as USMC plus 190; do you know? A. I don't know exactly. I would say that they probably were not.

Q. Were they as high as USMC plus 120? A. I don't know.

Q. I refer to a vessel to be fixed for the latter part of May loading. Do you have any recollection whether they were as high as USMC plus 100? A. You mean for the latter part of May loading?

Q. That is right. A. They were left at 100 for late May loading.

Q. Were they as high as USMC plus 50? A. Yes, around 50 or 55.

[223] Q. You stated, Mr. Martell, as I understood your testimony, and correct me if I am in error, that one of the reasons you were not interested or wouldn't have been interested in a subsequent charter of the "Strathbay" was because you only had one contract with Sinclair, and you had no further use for a second vessel; is that correct?

Mr. Underwood: May the time be fixed?

Q. I am talking about in April. A. No, I didn't say that, sir.

Q. Would you repeat for me—I am sorry, I don't recall—would you repeat what you did say about having a single contract with Sinclair? A. I don't think I said anything about that at all,—about any single contract.

Q. Did you have use for another vessel for loading at the Sinclair plant?

Mr. Underwood: If your Honor please, I object unless the time is fixed. Time is important.

The Court: What are you talking about?

Mr. Cardillo: All my questions on this particular point are directed to April of 1952, particularly from the 15th of April on to the end of the month.

[224] Mr. Underwood: If your Honor please, that is too big a spread. I don't want to expound on my reason because I might be accused of telling the witness how to answer.

The Court: There has been some testimony from this witness, from previous questions, in which he identified two charters for May 30th loading; am I correct in that?

The Witness: You mean the two that I was shown?

The Court: Yes.

The Witness: The two that I was shown, one was for loading May 17th and the other May 24th. Those were with another company. Those weren't with our company.

The Court: They weren't with your company?

The Witness: No, I think Mr. Cardillo showed me just as a matter of information.

The Court: Now, he wants to find out any other charters during that period of time for your company. I take it that that is the purport of the question.

The Witness: I don't know if that is what he wants to know or not.

Mr. Cardillo: He did testify that he did make one more charter for his company on the 25th of April.

[225] The Witness: Yes, that is correct.

By Mr. Cardillo:

Q. Which is the charter that I showed you? A. That was—for May loading.

Q. That was for a May loading? A. That is right, yes, sir.

Q. This is the charter that you made on April 25th with the Continental Oil Company. I show you Libelant's Exhibit 13. A. Yes, this is my copy of a tanker voyage charter between the Continental Oil Company and Coastal Oil Company.

Q. What is the designation of the lay-days on that charter-party, Mr. Martell? A. The lay-days are from May 23rd to June 13th, with readiness day the 23rd of May.

Q. Was the vessel engaged under this charter intended

to pick up cargo from the Sinclair plant at Corpus Christi? A. Yes, it was.

Q. Did it actually pick up that cargo? A. Yes, it did.

Q. On the 23rd of May, if the vessel "Strathbay" had been offered to you at plus 50, would you have engaged [226] the vessel?

Mr. Underwood: If your Honor please, I object to this as immaterial. We have gone very far afield.

The Court: It is highly speculative. I think I am going to sustain the objection.

Mr. Cardillo: Your Honor, there has been testimony that negotiations were conducted with this witness for a subsequent charter of the vessel "Strathbay" on or about the 23rd or 24th. He denies any such conversations. To that extent, and dealing with the credibility of the witness, I think the question may well be put.

The Court: No, I will sustain the objection. His testimony of the happening of that event, he said he had no such conversation. He did have a charter with another company, the Continental Oil Company, and he said that it picked up at Corpus Christi. So, that is a matter of argument about whether or not there was this conversation about the matters of this "Strathbay".

Your question is too speculative, as I see it.

Mr. Cardillo: I will withdraw it; your Honor.

By Mr. Cardillo:

Q. In April of 1952, and again I refer particularly to the week of April 21st, you state that the market rates [227] for May loading were about 55 over USMC; is that it? A. I would say approximately that, yes, sir. Let's pin it down, late May loading, second half of May.

Q. Mr. Martell, I wish to revert to the addendum on which you made the insertion, which is Respondent's Exhibit A. Do you recall on what date you made or caused the

insertion to be made? A. I would say, as near as I can estimate, I can't be perfectly sure, I would say it was on the 18th. No, not the 18th. It couldn't have been. I would say that it was on the day that it was received. I think this was received in our office on the 21st.

Q. Could it have been the 22nd? A. It could have been, conceivably.

Q. Was that the same day during which you had a conversation with Mr. Winterberger, in the course of which he gave you the vessel's position? A. It could have been.

Q. Could it have been in the same conversation? A. No, because as I recall, this was dictated to my stenographer who put this in. She typed that in.

Q. I am referring to your conversation with Mr. Winterberger, when you referred to the insertion. A. It might have been.

[228] Q. Was that conversation before or after your conversation with Mr. Vatis; do you remember? A. I would estimate that it was before.

Q. You had the vessel's position at that time, then did you not? A. The vessel's position at what time, sir?

Q. Mr. Winterberger had given you the vessel's position? A. I assume so, yes.

Q. Have you any recollection of what her position was at that time now? A. No, I do not.

Q. I didn't think you would. Did you know at that time that the vessel conceivably might not arrive at Corpus Christi by April 30th? A. Did I know that?

Q. Yes. A. Well, it was doubtful. There was still a possibility. I can't be sure that I knew positively it would arrive there, no, sir.

Q. Had Mr. Winterberger told you before that they wanted an extension of ten days? A. Yes.

Q. Because they felt that the vessel wouldn't arrive [229] at that time? A. Yes, he had told me.

Q. Had he made any representation to you as to the possibility of it arriving by the 2nd or 3rd? A. He might have.

Q. Under the circumstances, that would have indicated to you, would it not, that the vessel proceeding to her then discharging port, which was New Orleans, and I assume he had told you that, had he not? A. I imagine he had.

Q. Would not arrive at Corpus Christi before possibly the second or third, is that so? A. I will have to answer that this way: Brokers acting as intermediaries for owners pass this information on. They may or may not be correct. It is an operating problem, conditions change from day to day.

Q. Had you made any personal separate efforts to ascertain the position of the vessel? A. Not as such, no, sir.

Q. Didn't you ask someone else to get you information as to the position of the vessel? A. Yes, I did.

Q. Then you did make efforts to ascertain the position? [230] A. Yes, I made efforts, if you want to call it that. I made inquiries, that is what I would explain it as.

Q. Mr. Martell, if the vessel were not to arrive at New Orleans before the 30th or 1st or 2nd of May, and being then obliged to proceed to Corpus Christi, why should there have been any concern on your part about a trans-Gulf trip, unless you had granted a ten-day extension? A. There is always concern on our part about any ship that we have under charter.

Q. Yes, but I am talking about this particular ship and under those particular circumstances.

Mr. Underwood: I object unless the date is fixed.

The Court: He fixed the date at on or about the time that he received that addendum and told his secretary to put it in that exhibit. Am I correct in that, Mr. Cardillo?

Mr. Cardillo: That is correct.

Mr. Underwood: Very well.

By Mr. Cardillo:

Q. Will you answer the question? A. Let's go back. You say that the vessel wasn't due in New Orleans until the 30th?

[231] Q. No, Mr. Martell. You understand the question, don't you? A. I understand the question, yes.

Q. Will you please answer it? A. Yes, but you asked a question that I am not quite clear on: The question before that one where you made the statement that the vessel isn't due until the 30th.

May I have that re-read, please?

(Record read by the Reporter.)

The Court: What his question boils down to is this: Why did you have that placed in the addendum about the trans-Gulf voyage of this tanker if there hadn't been agreement to the extension granted. Is that your question?

Mr. Cardillo: Yes, your Honor.

The Witness: Why did I ask that it be put in, if we didn't have an agreement as to an extension?

I didn't ask that the addendum be sent to us in the first place. If you go back to my testimony, you will find that I said at the time that if Winterberger wanted to send the addendum over—

Mr. Cardillo: That is not responsive to the question.

The Court: Yes, he has got a right to say that [232] because your question might be prefaced upon a statement of facts not in the evidence.

He did testify in his direct examination that he said to Winterberger, "If you want to send it over, all right, or dictate it to my stenographer, all right."

The Witness: That is correct.

The Court: He said that in his direct examination.

Mr. Cardillo: Yes, I understand that. But, I, of course, had not asked him whether or not he asked for the addendum. I am asking him why he insisted on the insertion.

Mr. Underwood: He was saying why when Mr. Cardillo interrupted him.

By Mr. Cardillo:

Q. I mean then—will you continue, Mr. Martell? A. I think I said in my testimony just now that I didn't ask that the addendum be sent over. After it was received, I read it. When I told Winterberger, as I have testified, that we weren't interested, I said we wouldn't even give it further consideration without some stipulation being put in there that the vessel would proceed directly from its last discharge port, directly to Corpus Christi.

Q. How long, after your conversation with Mr. Winter- [233] berger did you speak with Mr. Vatis, do you recall? A. I can't remember that. It may have been an hour, it may have been two hours, it may have been three hours. I have so many telephone calls during the day it is pretty hard to pinpoint that.

Q. Is it possible it was a half hour? A. It is possible, but I rather doubt it.

Q. As a result of your conversation with Mr. Winterberger, as I understand it, you stated that with this change in the addendum, you would consider it, is that so? A. No, I think I said, sir, that we wouldn't consider it unless we had this particular clause put in.

Q. I have so phrased my question. With the clause in it, you said you would consider it, is that right? A. No, no, sir.

Q. I am afraid I don't quite understand you. You said you wouldn't consider it unless it had the insertion? A. That is correct.

Q. Doesn't that infer, Mr. Martell, that if it had the insertion, you would consider it? A. Not necessarily, no, sir.

Q. Did you preclude completely the idea of considering it? A. I wouldn't say that either, no, sir.

[234] Q. Yet, an hour later, when you spoke to Mr. Vatis, you told him that you wouldn't extend it, isn't that right? A. If that is what I testified, yes, sir.

Q. Mr. Martell, you stated that you got information as to the vessel's position. I show you Libelant's Exhibit 5

for Identification. Does that contain extracts of the vessel's position which you obtained? A. This is supposed to be extracts off the vessel's log which I obtained, yes, sir.

Q. You wrote that yourself, did you not? A. That is my handwriting, that is correct.

Q. Have you any idea when it was written? A. It was no doubt written somewhere around the 21st or 22nd.

Q. From whom did you obtain that information, Mr. Martell? A. I received this from the Marine Transport Lines.

Q. Whom in particular? A. Mr. Hartung.

Q. Did you write that all on the same date? A. Yes, I believe I did.

Q. Mr. Martell, in instructing or advising Mr. Winter- [235] berger that you were going to cancel the charter-party, did you ever tell him that you felt the owners had misrepresented the position of the vessel from the start? A. I don't know whether it was at the time I told him we were going to cancel the vessel. I did tell him at various times that I thought the owners had misrepresented the position of the vessel, yes, sir.

Q. Didn't you, in fact receive this information from Mr. Winterberger? A. No, sir, I did not.

Q. Have you any idea as to whether Mr. Hartung might have obtained information as to the actual times or hours of the day of sailing? A. I have no idea, no, sir.

Q. I am going to show you Libelant's Exhibit 8 and ask if you will be good enough to compare that with the memorandum that you wrote, which is Libelant's Exhibit 5 for Identification—

The Court: That wasn't in this proceeding. It is not marked Libelant's Exhibit 5 for Identification. That is on the deposition.

Mr. Cardillo: Yes, I am sorry.

The Court: If you are going to use that, have some identification. If you are going to offer it, [236] mark it for identification so the record will be orderly.

Mr. Cardillo: You are perfectly correct, your Honor. I offer this in evidence.

Mr. Underwood: No objection.

(Document above referred to marked Libelant's Exhibit No. 14 in evidence.)

The Court: That is a record of this ship's movements?

Mr. Underwood: Yes, sir, that is a record of the ship's movements.

The Court: Obtained by you from whom?

The Witness: Mr. Harting, of the Marine Transport Line.

By Mr. Cardillo:

Q. Now, I ask you, Mr. Martell, if you will be good enough to compare Libelant's Exhibit 8 with Libelant's Exhibit 14 and ask if, sir, there isn't a very striking similarity?

Mr. Underwood: If your Honor please, I object. The documents speak for themselves. This is in the interest of saving time only.

The Court: I will let him answer the question. Overruled.

[237] Mr. Underwood: I don't know what "striking similarity" means.

A. Well, of course, this is merely my pencil notation of a portion of what appears on here. It is not the thing in its entirety.

The Court: The dates on Libelant's Exhibit 14, as compared with the date on Libelant's Exhibit 8, the dates are the same and the designations and locations, approximately the same, if you can tell?

Mr. Cardillo: If Mr. Underwood prefers, I will be glad to go through each item, your Honor.

The Court: What is the sense?

The Witness: There are some differences here.

By Mr. Cardiflo:

Q. Will you point them out? A. Well, of course, this one starts here, "Arrived 3-6-52."

Q. What date are you referring to? A. The arrival date. I have no sailing dates on this sheet here, on Libelant's Exhibit 14, there are no sailing dates. These are merely arriving dates, except down in here. This one starts here with a column "Sailed Norfolk."

Q. Now, I call your attention to April 5th, for example. What does that say on your memorandum, which is Libelant's Exhibit 14?

[238] Mr. Underwood: If your Honor please, I object. First he asks him if there are any differences; when the witness proceeded to point differences, he abandoned that question and now asks him to read from the exhibit.

The Court: I will let the question in. Overruled.

Q. Will you read this item on the line marked "April 5th." A. "Sailed N. O.", which means New Orleans, "on 0430, April 5th.

Q. Will you read the item on April 7th? A. "Sailed 1500 April 7th".

Q. Read the item on March 21st. A. "Sailed March 21".

Q. On March 23rd? A. "Sailed 1900, 23."

Q. Then you do have sailing dates on there, don't you? A. I say, starting at the beginning of this log here.

Q. You are referring to the very first date, is that it? A. That is correct. Up here you have a date of "Arrived March 6 in Norfolk." I have nothing like that. Then you have "Sailed March 16, Norfolk." I have nothing [239] like that.

Q. I am talking about particular dates, Mr. Martell. A. You didn't say that, sir.

Q. You start on March 20 there. Will you look at the entry for March 20th and then look down from the dates

March 20th on the office-log, which is Libelant's Exhibit 8, right through the last date which appears on your slip, and compare them date for date? A. Well, starting at the beginning, March 20th, I have "Arrived Puerto Rico, Guanica, Mayaguez, 4-19-52, 1730;" then I have, "Sailed March 21", which I assume is from the same port, and this says, "sailed from Mayaguez 4-21 at 2300." I don't have any time there.

Q. It says, "Sailed Mayaguez"? A. Yes, 4-21. I have this arrived—

Mr. Underwood: In other words, Mr. Martell, you haven't got Mayaguez at all?

Mr. Cardillo: Mr. Underwood, he is looking at April on this slip and March on that one.

The Court: All of which means nothing at all to this record. You are talking about this slip and that one. If somebody ever has to take this record and read it, it is going to be tough.

Mr. Cardillo: I beg your Honor's pardon. He is [240] looking at April 21st on Libelant's Exhibit 8 and March 21st on Libelant's Exhibit 14.

By Mr. Cardillo:

Q. I ask you to look at March 21st on both exhibits.

The Court: What has all this got to do with it? What are you driving at here?

Mr. Cardillo: It is a question of credibility.

The Court: He admits that this Libelant's Exhibit 8 was sent to him by Winterberger. He doesn't deny that.

Mr. Cardillo: Yes, he does, Your Honor.

The Court: On Exhibit 13, he says he got that from the Marine Transport Company.

The Witness: No, I never got that.

The Court: You never received Libelant's Exhibit 8?

The Witness: No, I don't think it was ever indicated that it was sent to me, in the testimony.

Mr. Cardillo: As a matter of fact, your Honor, he denies completely having received any log-extract from Mr. Vatis or from Mr. Winterberger.

The Court: My understanding was it was dictated over the telephone.

Mr. Underwood: Winterberger said that. Not that [241] he sent him a paper. There has been no evidence of that that I can recall.

The Court: He said he had Vatis call him on the telephone and tell him where the ship was.

Do you admit that telephone call?

The Witness: I admit Vatis called me.

The Court: And told you where the ship was?

The Witness: That is right.

Mr. Cardillo: And Mr. Winterberger further testified that Mr. Vatis gave him the log-position, he got a log-extract and that he then telephoned Mr. Martell and read it off to him.

Mr. Martell denies having received that information.

The Court: Suppose he does. What has that got to do with credibility. He got what he says and he didn't get what he says he didn't get. You are taking up a lot of time on something which, to me, is inconsequential.

By Mr. Cardillo:

Q. Mr. Martell, did you ever have a conversation with Mr. Patton, of Simpson, Spence & Young? A. No, sir, I did not. You mean in connection with the case?

Q. Yes, in connection with the vessel "Strathbay".

[242] A. No, I don't recall ever talking to Mr. Patton about it.

Q. You did not call him up on April 28, 1952, and advise him that the vessel was to proceed to Corpus Christi, Sinclair's A. No, sir, I did not; not that I recall.

Q. Did you have any idea, Mr. Martell, how long the imminent strike of Sinclair was going to last? A. No, sir, I did not.

Q. Could it have lasted a month? A. It could have.

Q. Could it have lasted two months? A. Mr. Cardillo, as you know, strikes can last six months.

Q. Wasn't it actually your thought, Mr. Martell, on April 23, 24 and 25 that the strike in fact would not materialize? A. No, sir, I wouldn't say that.

Q. Mr. Martell, on April 25th, you chartered the vessel "Conoco Lake Charles" which was to report on May 23rd or 24th? A. That is right.

Q. If the strike was not over by that time, you would have had to pay demurrage on that vessel, is that [243] so? A. That is correct, yes, sir.

Q. Now, the demurrage rate was $186 per hour? A. That is right.

Q. It could have lasted for six months then? A. The strike?

Q. Yes. A. Yes, it could have.

Q. And if the vessel was there throughout the strike you would have had to pay demurrage throughout the strike? A. That is right.

Q. Did you have any conversations with anyone at Sinclair, Mr. Martell, about the position of the vessel? A. On what date, sir?

Q. On any date after April 21st? A. I imagine I did. I must have had several conversations.

Q. What was the general nature of those conversations? A. Conversations, if they were in connection with this ship, were probably to post them on the position of the ship, where it was, what the expected arrival date at Corpus Christi was, and to try to find out from them what the status of the negotiations between the workers and the companies were.

Q. Do you recall whether or not you advised Sinclair [244] on April 23rd that the vessel would arrive at Corpus Christi on April 30th? A. I probably did. It is possible.

Q. Do you recall whether or not on April 29th, you advised Sinclair that the vessel would arrive around May 1st or 2nd? A. I might have.

Q. You mean it is possible that you told Sinclair that the vessel would arrive after April 30th? A. That is possible, yes, sir.

Q. That would have been April 29th? A. No, not April 29th. I wasn't around on April 29th. It must have been on April 28th. I was out of town on April 29th.

Q. Mr. Martell, hadn't you advised Mr. Winterberger on April 28th that if the vessel did not show up at Corpus Christi by April 30th, you would cancel? A. Yes, I did, sir.

Q. When you advised Sinclair that the vessel would arrive May 1st or 2nd, which you state was the same day? A. I beg your pardon?

Q. You state that was the same day, April 28th that you advised Sinclair that the vessel would arrive May 1st or 2nd, isn't that correct? [245] A. Well, it must have been around that time. It couldn't have been on the 29th because I wasn't in town on the 29th.

Q. Then it was the 28th? A. Very possibly it was the 28th, yes.

Q. Did you tell Sinclair that you had cancelled the cargo? A. On the 28th?

Q. Yes. A. No, sir.

Q. Did you tell Sinclair that you were cancelling the cargo because the vessel would not arrive on April 30th? A. On the 28th?

Q. Yes. A. No, sir.

Q. What did you tell Sinclair on that date, if you recall? Merely that the vessel would arrive on May 1st or 2nd; is that correct? A. That is correct.

Q. Was it your intent that if the vessel arrived there May 1st or 2nd, you would load her with cargo? A. No, sir.

Q. Then what was your purpose in giving Sinclair that information? [246] A. For information only. The vessel was obliged to tender there, regardless of whether she de-

cided to exercise our option of cancellation on the 30th or not.

Q. If you cancelled the charter-party on the 30th, Mr. Martell, the vessel wouldn't have had to tender, would it? A. I think so. The ship was on the way there anyway.

Q. On April 28th? A. I assume it was.

Q. Do you know when the vessel got to Corpus Christi? A. I think it was around the 3rd of May.

Q. Where did it come from, do you know? A. I assume it was its last discharge port.

Q. Do you know what port that was? A. I know that was supposed to be in New Orleans.

Q. How long a run is it from New Orleans to Corpus Christi? A. I don't know exactly. I would say maybe four, five days.

Q. Mr. Martell, if I advised you that the vessel actually sailed from New Orleans on May 1st—that is on Exhibit 11—in giving you this information I am looking at Exhibit 11, which is the rough log of the vessel—at 2200, which is 10 o'clock at night, and arrived at [247] Corpus Christi at about 1400 in the afternoon, that is 2:00 o'clock in the afternoon, would you revise your statement as to four or five days? A. What dates are you talking about?

Q. The 1st to May 3rd. A. Yes, of course.

Q. Actually, it would take less than two days, would it not? A. That is correct, yes, sir.

Q. Mr. Martell, I show you Libelant's Exhibit 4, which is the covering letter, under cover of which the addendum was sent to you. Will you be good enough to read the first two lines of the letter? A. "We enclose herewith an addendum No. 1 to the above charter-party, in triplicate, for your signature."

Q. What is the first line of the ensuing paragraph, or the next line of the letter? A. "After signing, kindly return the original and duplicate."

Q. Mr. Martell, wasn't that unusual if you hadn't agreed to sign it? A. No, sir.

Q. It was a normal letter? A. For this type of cover-letter, yes.

[248] Q. As a matter of fact, it was exactly the same, or it contains the exact same phraseology as the covering letter which was sent with the charter-party that was agreed to, does it not?

Mr. Underwood: I object. It speaks for itself.

The Court: Overruled. I will allow it.

A. I think it was, yes, sir.

Q. Mr. Martell, I show you a letter dated April 30th from the Marine Brokerage Company, addressed to Coastal Oil Company and I ask you if you received the original of that letter in due course? A. Repeat that question, please.

(Pending question read by the reporter.)

A. Yes, I did. Mr. Cardillo, I would like to get back to this one here.

Q. Just a moment, Mr. Martell. Is this the original of the letter to which you just referred? A. Yes.

Mr. Cardillo: I will offer that in evidence.

Mr. Underwood: No objection.

(Document above referred to was marked Libelant's Exhibit No. 15 in evidence.)

The Court: That is dated when?

The Clerk: April 30, 1952.

[249] The Witness: Mr. Cardillo, I would like to go back to this letter here.

Mr. Cardillo: In due course.

The Witness: I think we made an error. This letter was not addressed to Coastal Oil Company.

Mr. Underwood: Indicating what exhibit, please?

The Witness: Libelant's Exhibit No. 4.

Mr. Cardillo: I am sorry. This is my error. I picked up the wrong covering letter.

I beg your pardon, Mr. Martell. The letter I intended handing you was Libelant's Exhibit 5, dated April 19th, with which the addendum was sent to you. Will you kindly read the second paragraph of that letter?

The Witness: Yes. Now, this letter is different than the other one. You asked me to read the other one.

Mr. Cardillo: I understand that.

The Witness: The first two lines are different.

Mr. Cardillo: Read the second paragraph of that letter.

The Witness: "Kindly arrange for charterer's signature and return the original."

[250] By Mr. Cardillo:

Q. Mr. Martell, will you read to me the second sentence from Libelant's Exhibit No. 15, which is the letter from Marine Brokerage Company to Coastal Oil Company, which covered the charter-party executed with Continental Oil Company? A. "Will you kindly have signed on behalf of the charterer—"

Q. Is that the entire sentence? A. That is the entire line.

Q. I said the sentence. A. "And return the original and triplicate original to us, retaining the duplicate original for your records."

Q. Mr. Martell, I show you Libelant's Exhibit 7, which is the letter from Simpson, Spence and Young, dated March 31st, under cover of which there was sent to you the charter-party of March 27th. Will you please read the second paragraph of that letter? A. "Kindly arrange for charterer's signature, returning the original to us and advising the number of photostatic copies you require for your files."

Q. Mr. Martell, isn't that the standard language for a broker, after negotiating an agreement orally, over a telephone, to prepare the document embodying the agreement [251] and send it with a letter of that nature? A. Not necessarily, no, sir.

Q. Have you, on any other occasion, received a letter from a broker asking you to sign a document forwarded to you and executed by one party, with a request that you execute an agreement to which you have not agreed? A. Yes.

Q. You have? A. Yes.

Q. Do you recall any particular instance? A. No, I don't recall any particular instance.

Q. You do know that that happened? A. May I enlarge on it slightly?

Q. You do know that it happened? Yes, you may enlarge on it. A. I can't pinpoint any specific date.

Q. Can you give me an instance when it happened? A. Not a particular—

Q. Aside from the present instance? A. Not a particular instance, no. I would like to make this statement: A broker, naturally, is anxious to conclude business. I have known brokers to make mistakes and assume they have concluded a charter and be in error, and forward a charter-party for signature and found out [252] they were wrong.

Q. Could you recall any particular instance when that happened? A. Not particularly, no, sir.

Q. When you received this particular letter, which is Libelant's Exhibit 5, it followed the standard phraseology when an agreement is reached, is that so? A. More or less.

Q. Did you call Mr. Winterberger's attention at any time that his letter was improperly worded? A. Well, on the day that we received it, I have already testified that I called him and asked that another clause be inserted.

Q. Yes, but did you tell him that he shouldn't have sent this kind of letter to you? A. No, of course I didn't.

Mr. Cardillo: May I have your copy of the telegram of May 5th.

(Mr. Underwood complies with request.)

By Mr. Cardillo:

Q. Mr. Martell, did your office receive a telegram on May 5th, from Simpson, Spence & Young, relating to the "Strathbay", and I show you a copy of the telegram Mr. Underwood has handed me, to refresh your recollection.. [253] A. This looks like a copy that we received, yes, sir.

Q. Do you know where the original of that telegram is?

Mr. Underwood: Perhaps I have it here. I produce a paper that has already been marked Respondent's Exhibit 25 for Identification.

The Court: That was on the deposition?

Mr. Underwood: Yes, on the deposition. It has been here all the time.

Mr. Cardillo: I offer this in evidence.

(Document above referred to was marked Libelant's Exhibit No. 16 in evidence.)

By Mr. Cardillo:

Q. Mr. Martell, what is your company's relationship with Sinclair? A. We are customers of Sinclair. I suppose you refer to Sinclair Oil Company.

Q. Yes. A. We are customers.

Q. Do you still do business with them? A. Yes, we do.

Q. As I understand, Mr. Martell, you testified this morning that you made an offer for granting the extension for a reduction from 190 to 100, whether or not [254] it made or missed; is that correct? A. I think in the conversation I said that we had talked about an offer of 100 whether it made or missed, and also an offer of 120 if it made or 100 if it missed.

Q. You did make both of those offers? A. Yes, sir.

Q. You didn't refer to those in your deposition. Was that an oversight? A. That was an oversight if I didn't refer to it, yes, sir.

The Court: We will take a five minute recess.
(Short recess.)

By Mr. Cardillo:

Q. Mr. Martell, I just have a few more questions and I ask you to bear with me.

In the deposition which you gave prior to this trial, at Pages 43 and 44, I refer particularly to Page 44, in answer to the question: "What did Mr. Buttler say?" you answered, "Well, we discussed pros and cons in connection with that business and he said 'How do you feel about it?' and I said, 'I think it is an offer that we have to reject.' And he said, 'I agree with you,' and I said, 'Well, I will go back and call Mr. Winterberger and tell him that we can't accept it.'".

[255] You were referring at that time to the offer made by Strathmore Shipping Company. Can you explain to me when you said, "It is an offer we have to reject,"?

Mr. Underwood: If your Honor please, the witness has already been confronted with this testimony and given an opportunity to answer. I object to it as repetitious.

The Court: I will allow it, overruled.

By Mr. Cardillo:

Q. Why did you feel you had to reject it, Mr. Martell? A. I don't know. I guess that was just the way that I phrased it, that is all.

Q. Mr. Martell, the data which is written on Libelant's Exhibit No. 14, which is the log-extract, was that written on one day? A. I would say yes, it was.

Q. As a matter of fact, if you recall, you so testified on your deposition, did you not? A. That that was written in one day?

Q. Yes. A. I believe so.

Q. Did you receive this letter from Sinclair Refining Company, addressed to you, and I refer to a letter dated April 6, 1952, and signed by Sinclair Refinery [256] Company, by C. R. Campbell? A. Yes, I believe I receive it.

Q. Do you recall when you received it? I suggest that your look at the reverse side of it. A. Well, there is a stamp on here, Coastal Oil stamp, that it was received on May 7th.

Q. This refers to dates after April 6th, which is the date of the letter, and prior to May 7th? A. I think that is a mistake in the date of the letter.

Q. You believe the letter should have been dated May 6th? A. I have no idea. I think that April 6th is wrong.

Q. You received this in the mail, did you not? A. It was received by the company in the mail, yes, sir.

Q. Would you say that the letter was apparently written on May 6th, but erroneously dated April 6th? A. I would say it was dated erroneously. I wouldn't want to say when it was written. I would, however, say it was written sometime after we cancelled the ship.

Q. Well, it was obviously written after May 2nd? A. Probably.

Mr. Cardillo: I offer this in evidence.

Mr. Underwood: I have no objection.

The Court: Received.

[257] (Letter above referred to marked Libelant's Exhibit No. 17 in evidence.)

By Mr. Cardillo:

Q. Mr. Martell, in this letter from Mr. Campbell, it refers to the vessel "Strathbay" which was due at Corpus Christi

about May 2nd, is this statement based on information which you gave him?

Mr. Underwood: If your Honor please, I object. How can this witness possibly know what information the writer of that letter had?

The Court: He didn't say that. He said, is the information in that letter based upon data that he gave to the Sinclair Oil Company. That is his question.

Mr. Underwood: Yes, but I object to it on the ground that this witness can't possibly know.

The Court: If he doesn't know, personally, he can answer No.

The Witness: That is the answer, no, sir. I do not know whether it was given by me or somebody else in the organization.

By Mr. Cardillo:

Q. Mr. Campbell further states in the letter that Sinclair was unable to load because of work-stoppage and [258] proceeds to say, and I quote: "As advised you by phone April 30th."

Did he so advise you on April 30th? A. I would assume so, if he says so in the letter.

Q. Do you personally recall whether he did? A. There were conversations on April 30th about work-stoppage and it was definitely stated that they were going to stop work on April 30th.

Q. It was on the afternoon of April 30th that you communicated with your counsel; is that right? A. I don't know whether it was in the afternoon or the morning.

The Court: You didn't send out a letter of cancellation, if I may use that word, until after you knew there was going to be a work-stoppage in Corpus Christi on the 30th of April?

The Witness: Your Honor, may I say this: We didn't cancel the ship until we were permitted to under the terms of the charter.

The Court: But that wasn't done until after you had received notice, or word, that there was to be a work-stoppage at Corpus Christi at midnight, April 30th?

The Witness: I don't know that to be a positive [259] fact.

The Court: You don't know if it was a positive fact. The question is, you didn't send it out until after you received that information, is that right?

The Witness: That is true, yes, substantially true.

The Court: All right.

By Mr. Cardillo:

Q. Mr. Martell, I show you two memo-slips which are headed "Memo from the desk of J. C. Martell." They have data dated April 30, 1952 and May 1, 1952. The second of these has data referring to May 5th and 6th. Were those memoranda prepared or dictated by you? A. Yes, they were.

Q. Do they reflect occurrences as they happened at that time? A. I would say pretty much, yes, sir.

Mr. Cardillo: I offer these in evidence.

Mr. Underwood: No objection.

The Court: Mark them as two separate exhibits.

(Memoranda referred to marked Libelant's Exhibits Nos. 18 and 19, in evidence.)

The Court: The No. 18 is what?

[260] The Clerk: The No. 18 is a letter of cancellation dated 4/30/52.

The Court: Dictated by you, you say, Mr. Martell?

The Witness: Yes, your Honor.

The Court: And the other one, the No. 19 is an office memo of what date?

Mr. Cardillo: The first date referred to on that is May 5th.

By Mr. Cardillo:

Q. Mr. Martell, referring to the first entry on Libelant's Exhibit 18, which contains an item dated April 30th, does that refresh your recollection as to when you consulted Mr. Foley of Foley & Statt, particularly the time? A. It says here, "Letter of cancellation dictated by Mr. Foley, 4/30/52, about 3:30 to 4:00 p.m."

Q. What is the next entry on that, Mr. Martell? A. "Mr. Martell delivered letter to Mr. Foley's office at 11:10 a.m., reached office 12:00 o'clock, returned to Coastal at 1:20." That refers, no doubt, to the following day.

Q. May 1st? A. I assume so, yes. I would say so because that was the date of cancellation, I believe.

[261] Q. Is this the cancellation letter that Mr. Foley dictated? I show you Libelant's Exhibit 9. A. Yes, it is.

Q. Did you go to his office on May 1st for the purpose of signing this letter? A. No, sir.

Q. Did you go there for the purpose of discussing the matter with him? A. Possibly.

Q. Mr. Martell, this letter of cancellation states that the reason you are cancelling it is because Strathmore failed to have the tanker ready to load by 4:00 p.m. April 30th? A. That is correct.

Q. Then the vessel was authorized to appear by 4:00 p.m., and not midnight, April 30th; is that so? A. No, sir.

Q. You sent the letter which says that it had to appear by 4:00 p.m.? A. That refers to the clause in the charter party which states that if the vessel fails to appear at the loading port by 4:00, the charterer has the right to exercise the option to cancel the vessel, provided the notice is given within twenty-four hours from 4:00 o'clock [262] on the cancelling date.

Q. I think you stated, Mr. Martell, that you had advised Sinclair, from time to time, as to the position of the vessel.

Did you usually do that with all vessels that were to pick up Sinclair cargo? A. It was a common practice to keep them posted as to the arrival time of the vessels.

Q. Do you know Mr. Campbell of Sinclair well? A. I do, yes, sir, as a business acquaintance.

Q. Do you know Mr. Woodward? A. I know Mr. Woodward over the telephone only. I don't believe I ever have had the pleasure of meeting him.

Q. You know Mr. Campbell quite well? A. Yes, I do.

Q. Mr. Woodward is Mr. Campbell's assistant, is he not? A. I think he is one of Mr. Campbell's assistants, yes, sir.

Q. How long have you known Mr. Winterberger? A. I have known Mr. Winterberger since about 1943.

Q. Did you have any dealings with him when he was Chief of the tanker section for the Petroleum Administration of the Government, during the war? A. I attended meetings at which he was present. I [263] had conversations with him, yes, sir.

Q. Did you have any dealings with him at all? A. Only in so far as I have stated here now.

Q. I am talking about in connection with his work as Chief of the Tanker-Section. A. No.

Q. You were in Washington at the time, too, were you not? A. Yes, I was.

Q. What position did you occupy? A. I was a Naval Officer.

Q. With the Navy? A. The Navy Department, yes, sir.

Q. In what capacity? A. I was a petroleum specialist. I was attached to the Fuel Division.

Q. That was for the Navy? A. For the U. S. Navy, yes, sir.

Q. In the dealings you had with Mr. Winterberger, did you always find him to be honest and truthful? A. As far as I could ascertain, yes, sir.

Q. Did you know, Mr. Martell, that Mr. James Patton gave a deposition in this case in which he testified, essen-

tially, that you telephoned him on April 28th, and [264] advised him that the vessel was still to go to Corpus Christi, Sinclair? Hadn't you been informed in that regard? A. I believe that our attorneys had informed me of that, yes, sir.

Q. You have testified that you did not so call on him? A. That is correct.

Q. Is it your testimony, then, that Mr. Patton was mistaken? A. Yes, it is.

Q. You have heard Mr. Vatis, Mr. A. T. Vatis, testify that you telephoned him on or about April 21st and that you were quite upset and that he told you exactly the position of the vessel. He stated that you were concerned lest the vessel would not arrive by May 9th and you were obliged to have it there by May 6th, and he read from his office log and gave you data as to the position of the vessel. Your testimony has been quite in conflict with that.

You have testified, in fact, that Mr. Vatis telephoned you. Is it your contention, again, that Mr. A. T. Vatis is mistaken? A. Yes, it is, sir.

[265] Mr. Winterberger, of course, has essentially testified contrary to you, particularly to the extent in regard to the addendum. He has testified, as you know, that you did agree to the addendum. You state that you did not. Is it again your contention that he was mistaken? A. It is, sir.

Q. Mr. Marron, in his deposition, the portions of which I read to you this morning, stated that he recalls general conversations with you in or about April of 1952, in which you discussed generally the question of a second or consecutive charter for the "Strathbay". You have stated that you did not have any such conversation. Is it your testimony now that Mr. Marron was mistaken?

Mr. Underwood: If your Honor please, I object to this question. I object partly on the ground that it calls for the characterization of what another man is supposed to have said, and partly on the ground that this deposition is not in evidence, and partly on the ground that the matter raised by Mr. Cardillo from

the deposition from which he was reading, was not a fair representation of what the witness, Marron, said.

The Court: I am going to sustain the objection [266] on th eground that there is nothing in this record about Marron or his deposition except such as you read. I don't think it is possible that you could characterize from this witness what is not in the record here. If he testified it would be something else again, as the other witnesses had, but I don't think you can go as far as characterizing something that is in a deposition that is not in evidence, —that is not in the record. It is only the part which you read.

Mr. Cardillo: That is the part which I referred to.

The Court: He has told you once before he disagrees with Marron—Marron is mistaken.

Mr. Cardillo: Thank you, your Honor. I withdraw the question.

By Mr. Cardillo:

Q. Did Sinclair ever advise you, Mr. Martell, that it was important, or necessary, or imperative, that the vessel "Strathbay" arrive at Corpus Christi by any particular date, in order for her to pick up the cargo? A. They probably did.

Q. Was that in connection with the strike situation? A. Not necessarily, no, sir. It could have been in [267] connection with the strike situation and also with the storage situation.

Q. Do you recall when they gave you that information? A. No, I do not.

Q. I refer you to Page 84 of your deposition and I will read the following questions and answers:

"Question: Did you discuss the strike situation with them at any time?

"Answer: Oh, yes; I no doubt did in my conversation I might have had with them, asked them the status of it.

"Question: But they never indicated, as I gather, that it would be imperative for the vessel to be there by a specific time?

"Answer: No."

Was that testimony erroneous? A. No, sir.

Q. You have just stated that they indicated to you that it was imperative for the vessel to be there by a particular date? A. No, I didn't. I said they might have.

Q. You stated here that they didn't. Did they or might have they, or did they not? A. They might have.

[268] Q. Then this is erroneous, is it not, Mr. Martell? A. It could be.

Q. You knew of the persons who had conversation with Sinclair, did you not? A. In practically all cases, yes, sir.

Q. Was there any case particularly that you recall when you weren't? A. Well, if information was to be passed on to them, as to the time of the vessel's arrival, that could be done by others in our organization.

Q. You were the person, in most cases, who gave that information; is that correct? A. That is correct, yes, sir.

Mr. Cardillo: That is all for the present, your Honor.

Redirect Examination by Mr. Underwood:

Q. Mr. Martell, I show you a letter dated March 27, 1952. Will you tell me whether or not that is a letter you received from Simpson, Spence & Young? A. Yes, it is.

Q. Will you read the first line or two? A. "Confirming telephone advices, we are pleased to have arranged charter between Strathmore Shipping Company, [269] Inc., owner of the 'American'".

Q. Is that what is called a fixture letter? A. Yes, it is, sir.

Q. Is that a letter that Mr. Winterberger wrote to you after you had arranged with him upon the terms of the original charter? A. Yes, it is.

Q. Is it customary in those situations where a telephone conversation is being confirmed, and where there has been an agreement reached by telephone, to begin with the words, "Confirming telephone conversation"? A. Yes, it is.

Mr. Underwood: I offer the letter in evidence.

Mr. Cardillo: No objection.

(Letter above referred to was marked Respondent's Exhibit D in evidence.)

By Mr. Underwood:

Q. Mr. Martell, what was the quantity of oil that you intended to carry in, and indeed did carry, on the "Conoco Lake Charles"? A. It was roughly sixteen thousand barrels, ten per cent more or less, or 100- or 105,000 barrels.

Q. How did that compare with the quantity to be carried in the "Strathbay"? [270] A. It was considerably larger.

Q. Were they vessels of the same type? A. No, they were different types of vessels.

Q. Did the "Conoco Lake Charles" pick up the cargo that you had engaged for the "Strathbay"? A. No, sir, not necessarily.

Q. When you undertook to charter the "Conoco Lake Charles", that was a week or so before the cancellation date on the "Strathbay", was it not? A. That is correct, yes, sir.

Q. Did you make any arrangement with Sinclair for a cargo for the "Conoco Lake Charles"? A. Yes, sir, I did.

Q. Was there a time, then, between the charter-date of the "Conoco Lake Charles" and the date when you cancelled the "Strathbay" that you were committed to Sinclair to pick up two cargoes? A. Yes, I was.

Q. Did you at some time cancel the cargo that you had engaged with Sinclair to load in the "Strathbay"? A. Yes, we did.

Q. On what date did you do that; do you recall? A. April 30th.

Q. Did you, later the same year, make another [271] charter to pick up a cargo of about the same quantity that the "Strathbay" was to load? A. Yes, we did.

Mr. Cardillo: At what time, if your Honor please? What time later in the year?

Mr. Underwood: I am about to fix it.

Q. I show you a charter party, dated June 5, 1952, with lay-days July 3 to July 17: Is that the charter you refer to? A. Yes, it is.

Q. And the name of the ship is what? A. The "Andrew Humphries".

Mr. Underwood: I offer it in evidence.

Mr. Cardillo: If your Honor please, I object to that. This is a charter-party calling for a loading two, three months after this particular transaction entered into two months or a month after the transaction, and it cannot have any bearing on the matter at issue.

The Court: It has some bearing on the facts as testified to here, in that the witness has said that that is the charter-party that he arranged—for his company arranged for—to pick up the quantity that would have gone in the "Strathbay" had the [272] "Strathbay" been down there. So, I am going to overrule your objection and allow it.

(Document above referred to was marked Respondent's Exhibit E in evidence.)

By Mr. Underwood:

Q. Will you tell us, please, Mr. Martell, why it is, in the oil business that the loading dates make an important difference in these charter-parties? A. Well, because of the storage element at the refineries.

Q. Can you explain that, please? A. Yes, I will. In the case of the Sinclair Oil Company, and in the case of this particular product, the refinery runs on this product are

not very great. Consequently, the amount of storage allocated to this particular product is small. After they reach a certain point in the tank, the cargo of the material must move out in order to make room for the material that is coming directly from the refinery and into the storage tanks.

By the same token, you can't possibly get a ship accepted for loading if the material is not available down there, if they have not accumulated enough for a cargo.

Q. If it has already been spoken for, you can't [273] have it at that time? A. That is correct, yes, sir.

Q. Who else was there, if anyone, in your office during April, 1952, who gave brokers and refiners information about the position of the ships and the dates when they were likely to arrive? And who received such informaton? A. Well, a man by the name of Geltz. He is the head of our Marine Department. He can pass on information of that kind, either to brokers, or to operators, or to refinery representatives.

Q. In your absence, does he sometimes do that? Is that part of his duties? A. Sometimes he does it, yes. It is part of his duties.

Q. How about your assistant, Mr. Marron? A. Mr. Marron, that is also part of his duties. In my absence he would do that.

Mr. Underwood: I have no further questions.

Recross Examination by Mr. Cardillo:

Q. Mr. Martell, I show you this document, Respondent's Exhibit D, which is the fixture letter just referred to. That is the letter which states that it confirms telephone advices with regard to the arrangement of the charter-party, March 27th. Below that paragraph [274] it then details, does it not, the conditions of the charter-party? A. It details certain conditions, yes, sir.

Q. Will you read the conditions that it details?

Mr. Underwood: If your Honor please, I object. The document speaks for itself.

The Court: What good is it going to do to have him read it?

Mr. Cardillo: Mr. Underwood is apparently trying to point out that where there is an agreement it is normal to send a letter concerning the fixture before the document of the agreement is forwarded. I am trying to show that in this particular instance there are a dozen or more details. Whereas, with regard to the addendum, there was only one question, and that was the question of time.

The Court: I can read that.

Mr. Cardillo: I will withdraw my question, your Honor.

By Mr. Cardillo:

Q. You stated, in answer to a question from Mr. Underwood a few minutes ago, that you cancelled the cargo from Sinclair which the "Strathbay" was to load; is that correct? [275] A. Yes, sir.

Q. I show you Libelant's Exhibit 17, which is the letter from Sinclair to you. I call your attention to the last clause in the letter—

The Court: Referring to Exhibit what?

Mr. Cardillo: 17.

Q. It states, "You have requested that loading instructions be cancelled." That refers to loading instructions, does it not? A. What this letter says, yes, sir.

Q. It doesn't refer to the cargo, does it? A. In my opinion, it is the same thing, sir.

Q. Is it? A. Yes, sir.

Q. In other words, you never picked up the cargo that the "Strathbay" was to take? A. Not at that time, no sir.

Q. And that the "Conoco Lake Charles", which vessel you chartered on April 25th, did not pick it up, either, did it? A. No, sir.

Q. I show you a sale-contract between Sinclair Refining Company and Coastal Oil Company, dated May 2, 1951.

Mr. Cardillo: May I have the original of this, [276] please?

Mr. Underwood: This is Coastal's file copy of the contract. We would like to substitute a photostat. I have no objection to your using the original temporarily, if you wish to.

Mr. Cardillo: It is perfectly all right with me to submit the photostat if the court will approve, in lieu of the original.

The Court: He hasn't any objection to that?

Mr. Underwood: Of course not.

Mr. Cardillo: I can use the photostat as an exhibit.

(Document above referred to was marked Libelant's Exhibit No. 20 in evidence.)

By Mr. Cardillo:

Q. Mr. Martell, Libelant's Exhibit 20 is a photostat of the contract which your company had with Sinclair; and I show you the original copy which you have of the contract, and ask you if that is a true representation of the contract, that is the photostat is a true representation of the original? A. Yes, it is.

Q. I notice that this contract provides for a cargo of 100,000 barrels, the last of which to be picked up in March of 1952. Was the "Strathbay" to pick up that [277] 100,000 barrels, or part of it? A. The "Strathbay" wouldn't pick up 100,000 barrels.

Q. Or part of it? A. Yes, I would say so.

Q. That was the last cargo under this contract, was it not? A. Well, Mr. Cardillo, I can't answer that yes or no. These contracts are very flexible. This contract may

call for four cargoes and they may have an arrangement to give us an additional cargo.

Q. But your contracts run from year to year, do they, not? A. Contracts usually run from year to year.

Q. What is the usual date when they start? A. Usually June 1st to June 1st. June 1st to May 30th.

Q. Normally, a contract or a cargo, rather, picked up in July, would be under a new contract which was executed as of June 1st; isn't that so? A. Not necessarily. There have been times when they have carried it over from a preceding year. They have so stipulated when they have made it available to us.

Q. Mr. Martell, has Mr. Underwood shown you at any time copies of documents received from Sinclair Refining Company? [278] A. No, sir, he has not.

Mr. Underwood: I take it the question means, and the witness understands, copies of documents received by me from Sinclair?

Mr. Cardillo: Yes, I think he understands that.

Q. Is that correct? A. Yes, I understand it. Maybe I answered too hastily.

Q. Did you receive these documents from Sinclair at any time? A. No, sir.

Q. I show you a letter dated April 25, 1952, from the Sinclair Refining Company, addressed to you. Did you receive that letter? A. Yes, I did.

Mr. Cardillo: I offer this in evidence.

Mr. Underwood: No objection.

(The document above referred to was marked Libelant's Exhibit No. 21, in evidence.)

By Mr. Cardillo:

Q. This letter reads:

"Following our several conversations, we understand that you are arranging to load the S.S. "Conoca Lake

Charles" with a full cargo of approximately 100,000 barrels of fuel oil, about May 24, 1952, at our Corpus Christi, [279] Texas, refinery, under our sales contract dated May 2, 1951. Will you please keep us informed of any change in the vessel's expected arrival?"

Did the "Conoco Lake Charles" actually load the full 100,000 barrels? A. Yes, it did. It loaded the full barrels.

Q. As a matter of fact, Mr. Martell, wasn't that the 100,000 barrels that the "Strathbay" was to take? A. No, it was not, sir.

Q. You said before in your testimony that the "Strathbay" was to load that last 100,000 barrels; isn't that so? A. I also said that these contracts are very flexible, that they can increase. They are not held strictly to the quantity.

Q. Was the contract increased, do you know? A. I also testified, if I may so, that we not only had nominated the "Strathbay" for 60,000, but we also nominated the "Conoco Lake Charles" for 100,000 and that they had both been accepted by Sinclair. There was a period there when both cargoes were nominated and accepted, and they would have loaded both cargoes.

Q. Do you know whether or not your contract was extended? [280] A. By "extended" you mean increased?

Q. Increased. A. I would say yes, it was increased.

Mr. Cardillo: I want to return the original to Mr. Underwood.

That is all, your Honor.

Redirect Examination by Mr. Underwood:

Q. I show you a letter dated June 6, 1952, from Sinclair, addressed to you; can you tell me whether or not that is the original of the letter you received? A. Yes, it.

Mr. Underwood: I offer it in evidence.

Mr. Cardillo: No objection.

(The document above referred to was marked Respondent's Exhibit F in evidence.)

Mr. Underwood: May I read this, your Honor?

The Court: Yes.

Mr. Underwood: "Mr. J. C. Martell, Coastal Oil Company.

"Dear Chet: Following our several conversations, we understand your arrangement to load the S. S. "Andrew Humphries" with a full cargo of approximately 67,000 barrels of fuel oil, about [281] July 7, 1952, at our Corpus Christi, Texas, refinery plant, under our sales contract dated May 2nd, 1951. Will you please keep us informed of any change in the vessel's expected arrival."

Q. Was the sales-contract mentioned in that letter that I have just read the same sales-contract under which you nominated cargoes for the "Strathbay" and the "Conoco Lake Charles"? A. Yes, sir, it was.

Mr. Underwood: I have no further questions.

Mr. Cardillo: That is all.

The Court: All right; thank you.

(Witness excused.)

Mr. Underwood: If your Honor please, the Respondent rests.

The Court: Any rebuttal?

Mr. Cardillo: Yes, your Honor.

GEORGE J. HARTUNG, called as a witness in Rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. Cardillo:

Q. Mr. Hartung, are you associated with the Marine Brokerage Company? [282] A. That is right.

Q. You were here when Mr. Martell testified as to having received certain information regarding the position of the

vessel "Strathbay". Are you the gentleman to whom he referred? A. That is right.

Q. Did you give him information, Mr. Hartung, with regard to the vessel's position from time to time? A. I did.

Q. Was that from day to day, or did you on any one day give him a series of information regarding the vessel? A. I would say that it was more a day-to-day affair, although I did have my assistant checking various people for me. But, mainly, day-to-day.

Q. When you gave him information with regard to the vessel's position, Mr. Hartung, did you give it with any great degree of accuracy? A. I believe in this case I did. We are called on quite often to check positions on vessels from various people, and in this particular instance I do remember that Mr. Martell had asked us for as accurate a position as we could get. We did check various sources such as Lloyd's Index, which is not too accurate, I will admit, [283] but to the best of my recollection, we did check some of our agents in the gulf, endeavoring to get as accurate a position as we could.

Q. Were you ever off as much as one or two days? A. I didn't quite get that.

Q. Were you ever off with regard to the information you gave as much as one or two days?

The Court: As to position?

Q. As to the position of the vessel? A. I would say that probably at times, yes.

Q. Were you able to give information with regard to the exact minute or time, or hour of arrival in respect to the vessel at any particular port or ports? A. That I cannot recall. I know that we went and did our best, as a service to find out the position. As to hour or minute, or anything, I don't recall. We are asked that quite often, to find out the positions of vessels and we do our best and as accurately as we can.

Q. I show you Libelant's Exhibit 14, which is a statement of the vessel's position, and ask you if that is the information you gave to Mr. Martell?

The Court: If that represents the information you gave to Mr. Martell?

The Witness: I can say only we did keep a check [284] of her itinerary from port to port. Whether we were able to give it as accurate, I don't recall.

Q. Would you have been able to give it as accurately as that information shows in respect to minute and hour? A. I would say that as far as minutes are concerned, No. Maybe hours, I could.

Q. Inasmuch as this contains minute designations, is it possible that this is not the information you gave to Mr. Martell? A. I would say it is possible, although I know that at that time we did give him as accurate, as I said before, information, as possible. My assistants also were checking at that time. I know they were talking to either Mr. Martell or his office. Whether they gave any information, more accurate information, I don't know. It was a regular, routine matter as far as we were concerned, and I don't recall myself giving minutes, by any means.

Q. Mr. Hartung, some months ago, I had a very brief conversation with you about the information you gave to Mr. Martell. As I recall, you stated—

Mr. Underwood: If your Honor please, I object to this. He is impeaching, or attempting to impeach his own witness.

Mr. Cardillo: If your Honor please, this is obviously a hostile witness. Under the Admiralty Rules—

The Court: I haven't seen any evidence of hostility. Maybe you didn't get the answer that you thought you might get, I haven't seen any evidence of hostility from this witness.

Mr. Cardillo: I certainly received the answer I thought I would get. I understand that Mr. Hartung

was associated—I don't know whether he still is—with Mr. Martell's company, and I think the very nature of the association dictates that.

The Witness: May I object to that, sir? There was no association.

The Court: There is nothing yet in this record that shows that he has got anything to do with Mr. Martell's company, that I heard, besides, that he gave him the information that he said it was the best he could get, and he also said, in answer to your question, when you showed him Exhibit 14, that he didn't think he said anything about minutes, but hours he might have.

I see nothing hostile about that.

You called this man. He is your witness. Unless [286] there is some evidence to me from the testimony that he is a hostile witness, I can't let you impeach your own witness.

Mr. Cardillo: I am not trying to impeach him as such. I am trying to refresh his recollection.

The Court: If you want to ask him: "Do you remember having a conversation at some time, and did you say to me thus-and-so," and it isn't contrary to anything he said here, I will let you do it.

Mr. Cardillo: I think, as a matter of fact, I will withdraw my question. I don't want to hold the court in session too long. I think Mr. Hartung has essentially given the information I have requested.

By Mr. Cardillo:

Q. Mr. Hartung, in 1952, your were with the company who were operators of the vessel owned by Coastal Oil Company, were you not? A. I am with the company that is affiliated with the company that operated it.

Mr. Cardillo: Thank you, that is all.

The Court: I want to ask Mr. Martell a question if I may.

Referring to Exhibit 14— perhaps this has been [287] answered. If so, it has escaped my memory. That is in your handwriting?

Witness Martell: Yes, it is, sir.

The Court: And it was put down all at one time by you, or was it put down at different times and on different occasions?

Witness Martell: I testified that I put it down on that piece of paper all at one time.

The Court: From information you received on different occasions?

Witness Martell: Various occasions.

The Court: All right; go ahead.

Mr. Underwood: I have no questions.

The Court: You may step down.

(Witness excused.)

The Court: We will adjourn until tomorrow morning at 10:30.

(Whereupon, at 5:00 o'clock p. m., Thursday, April 26, 1956, the trial was adjourned until Friday April 27, 1956, at 10:30 a. m.)

[288] (Trial Resumed)

April 27, 1956, 10:30 a.m.

Same Appearances.

James M. Patton, called as a witness in rebuttal, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Cardillo:

Q. Mr. Patton, what is your occupation? A. Tanker-broker for Simpson, Spence and Young.

Q. How long have you been so engaged? A. Over thirty-five years.

Q. Are you familiar, generally, with the charter-party of the vessel "Strathbay" by the Coastal Oil Company in March and April of 1952? A. Yes, sir.

Q. Did you ever have a conversation in the latter part of April with Mr. Martell of the Coastal Oil Company regarding the vessel "Strathbay"? A. Yes, sir.

Q. Do you recall the date of that conversation? A. April 28, 1952.

Q. Will you please tell the Court the substance of that conversation? [289] A. Mr. Martell called Mr. Winterberger, and I answered the telephone. The substance of the conversation was that the "Strathbay" is still to load at Corpus Christi, at Sinclair.

Q. What did you say to Mr. Martell? A. I thanked him and told him I would pass it on to Mr. Winterberger.

Q. What did you do after the conversation? A. I contacted Captain John Vatis and relayed the message to him.

Q. Didn't Captain Vatis have any comment when you relayed that message?

Mr. Underwood: If your Honor please, I object to the conversation.

The Court: Yes, sustained.

Q. Do you know whether Captain John Vatis took any action as a result of this conversation you had with him?

Mr. Underwood: I object.

The Court: No, I will overrule that.

I will allow that.

What, if anything, did Vatis do after the conversation; if you know?

A. He told me—

Mr. Underwood: I object to what he told him.

[290] The Court: You can't say anything about what he told you; that is hearsay.

Mr. Cardillo: That is all, your Honor.

The Court: All right, go on.

James M. Patton—for Libelant—Cross
Joseph A. Winterberger—for Libelant—Direct

Cross Examination by Mr. Underwood:

Q. Mr. Patton, do you know Mr. Martell personally? A. I don't think so.

Q. Had you ever had any dealings with him before, negotiated any business with him? A. No, sir.

Q. Did you recognize his voice on the telephone? A. The gentleman said it was Mr. Martell.

Q. You don't know who it was? A. He said it was Mr. Martell.

Q. Did he say it was Mr. Martell or Mr. Martell's office? A. Mr. Martell.

Q. All you know about the conversation is that the identity of the man you were talking to is what some unknown voice over the telephone said to you? A. He said that it was Mr. Martell.

Q. And that is all you know of the identity of the person? [291] A. Yes, sir.

Mr. Underwood: If your Honor pleases, I move to strike out the testimony.

The Court: Denied.

Mr. Cardillo: That is all.

Mr. Underwood: That is all.

(Witness excused.)

JOSEPH A. WINTERBERGER, recalled as a witness, in rebuttal, testified further as follows:

Direct Examination by Mr. Cardillo:

Q. Mr. Winterberger, on or about April 23, of 1952, did you have any conversations with Mr. Martell with respect to the negotiation of a second or consecutive voyage of the vessel "Strathbay" for Coastal Oil Company?

Mr. Underwood: If your Honor please, I object to that as having been gone over thoroughly on direct, and not proper rebuttal.

The Court: I think you are right.

Mr. Cardillo: If your Honor please, on the direct there was objection to the testimony going in because it had no bearing on the charter-party. [292] Mr. Martel, in his testimony, has denied those negotiations and this is merely in rebuttal to Mr. Martell's testimony.

Mr. Martell flatly denied having any such conversation.

The Court: I will allow the question, did he have a conversation with him in reference to the matter that you talk about? That is all. I will allow.

A. Yes, sir.

By Mr. Cardillo:

Q. Did Mr. Martell make any offer in that conversation, Mr. Winterberger?

Mr. Underwood: I object on the same ground. This has all been gone over.

The Court: Mr. Martell, as I recall it, denied that he had such conversation. I will allow the question. Overruled.

A. Yes, sir.

Q. What was the offer which Mr. Martell made? A. He agreed to fix the "Strathbay" at plus 35° in response to my offer of plus 50.

Q. You say he agreed to fix it at plus 35? A. He agreed.

Mr. Underwood: If your Honor please, I move [293] to strike out as not a proper answer. Let him give the substance.

The Court: Yes. Strike out the answer.

Q. Will you give the substance of Mr. Martell's offer?

Mr. Underwood: I object to the form of the question.

The Court: You had a conversation with him. What was the conversation?

The Witness: The conversation, sir, was the negotiation of the "Strathbay" for an additional voyage on conditions of lay-day of May 17th, cancelling May 31st.

Briefly, I offered him the boat at plus 50 for a reply within a certain period of time. He called back and advised me that he would take the boat at plus 35. I called the owner. The owner said no, that he would not take plus 35, that he wanted plus 50. I so advised Mr. Martell; and he declined.

By Mr. Cardillo:

Q. Was that the end of the negotiation with Mr. Martell? A. No, sir.

[294] Q. What further negotiations were there?

Mr. Underwood: If your Honor please, may I just have one objection to this whole line?

The Court: Yes, I think you are going far afield here on this now. He has said he didn't have any conversation. I let you show that this man had a conversation about a new voyage. I don't think I am going to let you go any further.

Mr. Cardillo: If your Honor please, the entire negotiation is so closely tied up with the charter-party of the "Conoco Lake Charles", which is in evidence, which the Respondents made the following day after these negotiations fell.

The Court: It is in the record already. I am not going to let you go any further.

By Mr. Cardillo:

Q. Mr. Winterberger, you have testified that on or about April 21st, you gave Mr. Martell certain data from an extract of the log of the vessel, which you obtained from Mr. Vatis. I show you now Libelant's Exhibit 14, and

ask you if that is a true reflection of the information which you gave to Mr. Martell?

Mr. Underwood: I object to the form. Never mind, I won't object.

[295] The Court: Go ahead, objection is withdrawn.

A. I am quite positive that this is the information that I gave to Mr. Martell over the telephone. I believe I forwarded it to him the same night or the next day.

Q. Did you forward this particular document? A. No, sir, but in similar form in handwriting.

Q. What causes you to be positive? A. There are certain items on this document, sir, that no one but myself could have given to Mr. Martell.

Q. What are those items? A. I will first bring your attention to the last item, sir, in which it states: "Sailed Mayaguez 1500 on the 21st." That was the day on which I gave this information to Mr. Martell. And, I recall distinctly that in speaking with the owner, I said, "Tassi, let's get it right up as close as we can. Has the boat sailed Mayaguez?" He said, "Well, the information I have is that she is about to sail, or she is going, I don't know, but I think 1500 is a fair time. At 1500, from the information that I have here, she should get away by 1500."

There are other items on this paper, sir.

Q. What are the other items? A. When I gave this information to Mr. Martell, I said, "Chet, O. K., we start with March 20th. Are you ready? [296] I have got the arrival time, the sailing time at the ports and I have got the dates." He says, "O. K.—"

I started to read off: "Arrived March 20th," but I advised him of the time.

He said, "Let's forget the time."

The next time, I said, "Sailed March 21st."

The third item here gives the time, and I recall Chet saying, "Gee, maybe we better have the time."

I said, "O. K., Chet, how do you want it?"

He says, "Well, give me the port and then the time, and then the date."

I proceeded to do that.

I recall further, sir, that there is a notation here that she sailed New Orleans. It doesn't say sailed. It says, "New Orleans 0750, the 29th."

I said, "There was a 24-hour delay," because a vessel had been grounded in the channel, and that was certainly no fault of the owner.

I continued on.

I come down here to April 5th, after which it states "Sailed New Orleans 0430."

I said, "Chet, she lost three days discharging. I know she can discharge this molasses in two days. She lost three days."

[297] I remember saying, "Chet, that is the reason the owner wanted this three day extension. Don't you remember we started and he wanted a three day extension back a couple of weeks ago? That is the reason he wanted it because the vessel was delayed discharging."

I go down here to the next place. I remember specifically the notation; "Sailed Jacksonville, 1400, April 12th, for Puerto Rico."

The next item on the 14th for Barahona, I said; "Chet, she was going to Puerto Rico. The charterer has now directed the boat to Barahona. That is more time." I believe I possibly explained to him that instead of going to one port, Puerto Rico, she was going to Barahona and Mayaquez, which would have consumed more time.

I said, "Chet, add those things up and if she hadn't had those unusual occurrences, she would have been at the loading port—at your loading port—on April 22nd or 23rd, which was the date that I had indicated to you when we fixed this charter on March 27th."

Q. The three items to which you refer, were in explanation, were they of the reason for the delay?

Joseph A. Winterberger—for Libelant—Direct

Mr. Underwood: I object.

A. Yes.

The Court: Yes; strike out the answer.

[298] Q. In your experience with ships and shipping, would it have been possible to obtain information which is contained on that extract, in the detail which it appears there, in the market?

Mr. Underwood: I object.

The Court: I will sustain the objection.

Q. Is information such as appears on that slip available on the market?

Mr. Underwood: Objection.

The Court: Same ruling; sustained.

What difference does it make? He said he got it. Martell said, he testified he got it from the man who testified here, the Marine Brokerage Company. He has denied that now. He says that information on Libelant's Exhibit 14 had to come from him because of what he said to Martell.

That is a question for me to determine.

Mr. Cardillo: The point I am trying to make, your Honor, is—

The Court: You are trying to say he couldn't get it any other place?

Mr. Cardillo: That is right.

The Court: You got that in the record already. He said that. I can't have him express an opinion [299] about that.

By Mr Cardillo:

Q. Mr. Winterberger, are you familiar with Lloyd's List? A. Lloyd's has various lists.

Q. The shipping list, where they give you ship information? A. You are thinking of Lloyd's Index.

Q. Are you familiar with Lloyd's Index? A. Yes, I refer to it quite frequently.

Q. Is the data which appears in Lloyd's Index given in detail such as appears on this slip?

Mr. Underwood: I object.

The Court: I will allow that because there has been some testimony from Mr. Martell about Lloyd's Index. I will allow that question.

A. No, sir.

Q. Mr. Winterberger, in the deposition of Mr. Martell, which was given on November 4th, immediately after your deposition, he made the following statement in answer to the following questions; I refer to Page 52, Mr. Underwood:

"Question: What was the substance of your conversation at that time? —"

[300] To enlighten you, this refers to a conversation on April 21st.

"Answer: Well, I called Mr. Winterberger and said that we had received the addendum. I said, as you recall, we haven't accepted your offer, nor have we granted you an extension, but, I said, in looking over this addendum, before we would even consider accepting anything, we want some changes made in this addendum, because, I said, I heard that there was a possibility that the vessel, after its last port of discharge, which I recall was New Orleans, might not proceed—

"Question: Go slowly, please.

"Answer: (Continuing) — directly to Corpus Christi.

"Question: What did he say to you?

"Answer: Well, he said that he had heard some rumors to that effect, but he said that 'I want to assure you'.

"Question: He heard some rumors to what effect?

"Answer: It was going around the trade that the "Strathbay" was coming into New Orleans to discharge and then was taking a cross-Gulf trip."

Now, Mr. Winterberger, did you state at that time, [301] to Mr. Martell that you heard rumors to the effect that the vessel was making a cross-Gulf trip?

Mr. Underwood: If your Honor please, I object on the ground that that is not proper rebuttal.

The Court: I don't think so either. I don't see how it is proper rebuttal.

Mr. Underwood: On the further ground that he hasn't read all of the last answer to the question.

Mr. Cardillo: I will be glad to read the last answer.

The Court: That you will have an opportunity to do yourself. How is it proper rebuttal?

Mr. Cardillo: A statement is attributed here to Mr. Winterberger. It deals with the very point at issue, your Honor. Mr. Martell has stated that there was a rumor that the vessel was making a cross-Gulf trip. I want to point out—which statement he made also on direct testimony, yesterday, as I recall—I want to point out that it was impossible for that vessel to have made a cross-Gulf trip, unless the rumor, if there was such a rumor, was made on information that the extension had already been granted. There could not have been a rumor unless there were an extension.

[302] I want to point out that this vessel could not conceivably have made a cross-Gulf trip.

The Court: I still stick to my ruling. I don't think it is proper rebuttal?

By Mr. Cardillo:

Q. Mr. Winterberger, Mr. Martell testified in this case yesterday that brokers will occasionally send out a document for signature, despite the fact that no agreement has been

reached. Have you ever sent out a form-covering-letter, such as Libelant's Exhibit 5, or a charter-party, or other form of agreement such as Libelant's Exhibit 3, requesting either an owner or a charterer's signature to the agreement which had not been definitely reached?

Mr. Underwood: I object.

The Court: Overruled. I will allow that.

A. No, sir, never.

Q. Have you ever been involved in a dispute concerning any agreement?

Mr. Underwood: I object.

The Court: That I can't see. I sustain the objection to that.

Q. Have you ever been involved in any transaction involving an oral charter-party concluded by you, which [303] was subsequently denied by either party?

Mr. Underwood: I object.

The Court: I can't see the relevancy of that. I sustain the objection.

Mr. Cardillo: That is all.

Cross Examination by Mr. Underwood:

Q. Mr. Winterberger, in what form do you say you gave the information on Exhibit 14 to Mr. Martell? A. I believe, sir, that it was on the same type of paper. I believe, sir, however, that the dates on the piece of paper that I sent to Mr. Martell were after—that the time was after the dates instead of before them.

Q. You gave it to him on a piece of paper? A. I sent it to him. I am almost positive, sir, I sent it to him. I dictated it over the telephone to him.

Q. You both gave it to him over the telephone, with great detail, with dates and times, and then you sent it to him on a piece of paper, besides? A. Did you say "we both"?

Q. I say you did two things. Is this your testimony that you both gave him this detailed information over the telephone and sent him a piece of paper with the same [304] information on it? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Did you understand, in the course of this telephone conversation that he was writing it down? A. Yes, sir.

Q. Did you send a piece of paper with the covering letter? A. No, sir.

Q. Did you make any diary entry that you sent it to him on a piece of paper? A. No, sir, not to the best of my knowledge.

Mr. Underwood: I have no further questions.

Mr. Cardillo: That is all.

(Witness excused.)

ANASTASIOS T. VATIS, recalled, having been previously duly sworn, testified further as follows, in rebuttal:

Direct Examination by Mr. Cardillo:

Q. Mr. Vatis, I show you Libelant's Exhibit 14, which is an extract of the log, showing the position [305] of the vessel "Strathbay". You have testified that you gave the log-information to Mr. Winterberger, and that you obtained that information from the office log-book, which is Libelant's Exhibit 8.

I call your attention to the item appearing on the line for the date of April 21st, which I believe is the last entry on Libelant's Exhibit 14, and ask you if you can explain the difference in the two documents?

Mr. Underwood: If your Honor please, I object to this as not proper rebuttal, on the ground that it is not binding, incompetent, irrelevant and immaterial.

The Court: Firstly, I don't see how it is proper rebuttal.

Mr. Cardillo: This is all in connection with the log-extract, your Honor. The matter of that extract of the log is highly important to this issue, because it was on the day after the addendum, after the addendum was agreed to, and when Mr. Martell had received it.

The Court: That is all a matter of record. That is all in the exhibit.

Mr. Cardillo: He has denied that he received this log from the owners, through Mr. Winterberger.

[306] The Court: Mr. Winterberger has testified just now that he sent it. How can this question be proper rebuttal—asking him at this time to compare two exhibits?

Mr. Cardillo: I am not asking him to compare them. I am asking him merely if he can explain the discrepancy in the one item between one exhibit and the other.

The Court: I don't think that is proper rebuttal. I will sustain the objection.

By Mr. Cardillo:

Q. Mr. Vatis, you heard Mr. Winterberger's testimony a few minutes ago with regard to that log-extract? A. Yes, sir, I have

Q. Is that the information which you sent to him?

Mr. Underwood: If your Honor please, I object.

The Court: I will allow that question. Overruled.

A. Yes, it is.

Q. Did you discuss the possibility of the departure of the vessel "Strathbay" from Mayaquez on April 21st with Mr. Winterberger?

Mr. Underwood: I object.

The Court: No, I will overrule that. I will [307]

allow that. Yes or no.

The Witness: Yes, I did.

Q. Did you give him an estimate as to when the vessel would depart?

Mr. Underwood: I object.

The Court: No, I will allow that: That might be some substantiation of Winterberger's testimony.

Mr. Underwood: If your Honor please, I move that it be stricken. My motion is directed to the entire answer.

The Court: You mean so much of the answer as has to do with the time the boat got into Mayaguez?

Mr. Underwood: Yes, sir.

The Court: I think you are probably right in that.

Mr. Underwood: My motion is directed to the entire answer.

The Court: Read back the answer.

(The answer was read by the Reporter).

[308] The Court: The whole answer may be stricken out.

Your answer to that may be yes or no.

The witness: Yes, sir.

By Mr. Cardillo:

Q. What estimate did you give him?

Mr. Underwood: I object.

The Court: No, I will let him answer that. Overruled.

A. Well, that she would sail at 1500 on the 21st.

Q. Mr. Vatis, you have heard the testimony of Mr. Winterberger a few minutes ago with regard to the negotiations in respect of the vessel "Strathbay" for a second voy-

age, second, or consecutive voyage for Coastal Oil Company, of the vessel. Did Mr. Winterberger report to you in respect to those negotiations?

Mr. Underwood: I object.

The Court: I will overrule the objection. That is, again, yes or no.

A. Yes, sir.

Q. Did you, in fact, fix the vessel to Coastal Oil Company?

Mr. Underwood: I object.

The Court: Did you what?

Mr. Cardillo: In fact, fix the vessel to [309] Coastal Oil. That is, charter it to Coastal Oil Company.

The Court: The testimony is already in the record that he didn't. Sustained.

Q. I show you two charter-parties, dated April 24, 1952, between Strathmore Shipping Company and the Pure Oil Company, and City of Jacksonville, Florida, respectively, and I ask you if those charter-parties were agreements in which your company entered for the use of the vessel "Strathbay"? A. Yes, they are.

Q. Were these charter-parties intended to cover voyages immediately following the engagement of the vessel "Strathbay" on the charter in question?

Mr. Underwood: I object.

The Court: Sustained.

Mr. Cardillo: I offer these in evidence, your Honor.

Mr. Underwood: If your Honor please, I object to both on the ground that they are immaterial.

The Court: Sustained.

Mr. Cardillo: If your Honor please, these charter-parties have in in them the lay-days of the vessel. Those lay-days necessarily reflect, on [310] April 24, the possible loading date of the vessel under the charter

in question. To that extent, they are very material to the point at issue.

The Court: I think I will reverse the ruling. I will allow it.

Mr. Cardillo: Thank you.

(The documents above referred to were marked Libelant's Exhibits Nos. 22 and 23 in evidence.)

By Mr. Cardillo:

Q. At any time after April 15th, and assuming that the cancelling date of the charter-party was April 30th would it have been possible for the vessel to make a cross-Gulf trip? A. No, sir.

Mr. Underwood: I object. It is not proper rebuttal. It is incompetent, irrelevant and immaterial, and highly speculative.

The Court: It is speculative. I don't think it is proper rebuttal.

Mr. Cardillo: Mr. Martell has testified again, your Honor, that he was fearful that the vessel was going to make a cross-Gulf trip. The only way we can establish that the fear was generated because of the extension of the cancellation date, is to [311] show that it couldn't possibly have made a cross-Gulf trip with the cancelling date April 30th.

The Court: No, I sustain the objection.

Mr. Cardillo: That is all.

Mr. Underwood: No questions.

CHARLES G. WOODWARD, called as a witness in rebuttal, and having been first duly sworn, testified as follows:

Direct Examination by Mr. Cardillo.

Q. Mr. Woodward, are you associated with the Sinclair Refining Company? A. Yes, sir.

Q. What is your position there? A. I am Additive Clerk.

Q. Are you an assistant to Mr. Charles R. Campbell? A. Yes.

Q. Are you appearing in court here pursuant to a subpoena served upon you? A. Upon Mr. Campbell.

Q. A subpoena was served upon Mr. Campbell? A. Yes, sir.

Q. And you are appearing in accordance with an [312] agreement that you may substitute for him? A. yes, sir.

Q. Were you asked to produce certain papers? A. Yes, I was.

Q. Are these the papers? A. That is right.

Q. May I see them, please? A. (Witness hands to counsel).

Q. Mr. Woodward, are these the Sinclair Refining Company files, or do these papers constitute the Sinclair Refining Company's file with regard to the vessel "Strathbay", which was to load for Coastal Oil Company?

Mr. Underwood: If your Honor please, I object to the form. Let us let the witness testify.

The Court: Yes. Technically that is so.

What are those papers?

The Witness: They are Sinclair Refining Company's file on a vessel that loaded, that was intended to load for Coastal Oil Company back in 1952.

The Court: At Corpus Christi?

The Witness: At Corpus Christi.

The Court: Go ahead.

[313] By Mr. Cardillo:

Q. Are these kept in the regular course of business? A. That is right.

Mr. Cardillo: I offer these in evidence.

Mr. Underwood: I have no objection.

(The documents above referred to were marked Libelant's Exhibit No. 24 in evidence.)

Q. Mr. Woodward, I show you the page dated April 8th, which contains a series of notations on the righthand side of that, and I ask you if those notations are in your handwriting? A. Some of them are, others are not. Do you want me to point out which are mine?

Q. The ones on the righthand side? A. That one is not mine (indicating). This one is, (indicating).

Mr. Underwood: If your Honor please, I cannot hear.

The Witness: The top one is not mine.

Mr. Underwood: There are quite a number—if he is going to answer this question, wouldn't it be better to have him read those which are his?

The Court: In the first place, that exhibit is marked, with a number of papers, as one number.

[314] Mr. Cardillo: I refer to the page as the one dated April 8th, with the notations on the right hand side of it.

The Court: All right, go ahead.

The top notation is not in your handwriting?

The Witness: That is right.

The Court: You are talking about the notations on the right of that piece of paper dated April 8th?

The Witness: Right.

The Court: Go down now and tell us which are in your handwriting.

The Witness: The next notation, down where it says "4-27 per Coastal, 4-21,

That is mine.

The next one, where it reads "4-30 per Coastal, 4-23," this is mine.

"5/1-2, per Coastal, 4-25."

That is mine.

Is this considered the righthand side?

Q. No, that would be underneath.

Mr. Underwood: Indicating that the entry 4-30 is not in your handwriting?

The Witness: That is right, sir.

Q. Do you know whose handwriting that is? [315] A. Yes, sir, I do.

By Mr. Cardillo:

Q. Whose is it? A. Mr. C. R. Campbell's.

Q. Do these dates 4-27, 4-30 and 5/1-2, refer to the date the "Strathbay" was—

Mr. Underwood: If your Honor please, I can see right now I object to the form of the question.

Q. What do the dates 4-27, 4-30 and 5/1-2 refer to? A. Well, my memory isn't too clear on it, because it is four years old. But, I would say this one in particular, this first one—that isn't my handwriting. The 4-27 is apparently—see where I come down from the circle from 4-25, 4-27 per Coastal, 4-21.

To me, at this time, if I did the same four years ago that I ordinarily do, I would say that on April 21st, in conversation with Coastal, the position of the "Strathbay" had been delayed possibly two days here. Instead of the expected time of loading April 25th, it was then April 27th. The indication was that it would be possibly April 27th.

Q. Do the other dates also refer to the respective times of loading?

[316] Mr. Underwood: I object to the form.

The Court: What do the others refer to?

The Witness: April 30th, per Coastal, 4-23, that would again indicate to me that on April 23rd, in conversation with someone at Coastal, the expected arrival date at Corpus Christi of the "Strathbay" then indicated that it would be April 30th instead of April 27th.

Q. With regard to the next item? A. With regard to the next item; it is not too clear. My memory doesn't go back that far, to be sure, because at that time there was a strike imminent. Sinclair Refining Company plant had a strike. I wouldn't want to say exactly that that was typical of the notes above.

Q. Can you state—do you know? A. Do I know what?

Q. You are saying that you wouldn't want to say exactly. I am asking you if you recall what it states? You have testified with regard to the other items. A. That is right. I don't recall that last one at all, because, as I say, of the strike condition.

The Court: Would that last one be similar to the two top ones that you just told me about?

The Witness: I am not sure.

[317] The Court: It is in the same column?

The Witness: It is in the same column, but as I say, around that time we had an imminent strike.

The Court: Based upon the ones that you testified about, would that indicate that the loading date had been extended to May 1st?

The Witness: It could be, yes, sir, but I am not positive.

By Mr. Cardillo:

Q. And the item above it that you testified to a few minutes ago, indicated, as I recall your testimony, that it referred to the loading date of April 30th?

Mr. Underwood: If your Honor pleases, that is not what the man said.

Mr. Cardillo: My recollection is that he referred to—

The Court: Ask your question.

Mr. Cardillo: That is all, your Honor.

Cross-Examination by Mr. Underwood:

Q. Mr. Woodward, you didn't have the conversation with Mr. Martell that is referred to in the note of April 30th, did you? A. I have nothing here that indicates I talked with [318] Mr. Martell. I have Coastal down.

Q. There is, on the page for April 8th, the note which says, "4-30, phoned Martell, unable load after 12:01 Friday, 5/2". A. That is in Mr. Campbell's handwriting.

Q. You didn't have that conversation? A. No, sir, I did not.

Q. You don't know, then, what was said? A. No, sir, I do not.

Q. You said that in response to Mr. Cardillo's question, that you weren't at all sure what the entry "5/4-2 and so on," stands for; is that correct? A. That is right.

Q. It is entirely possible that this can be something different than the entries above, because of the intervening strike situation; is that correct? A. Yes, sir, that is exactly what I am trying to convey.

Q. Does the first entry that you wrote, 4-27, have anything to do with the allowable lay-days in the charter of the ship? A. I don't believe we had anything to do with the charter of the ship. Ours is purely an F. O. B. sale to Coastal Oil Company. We weren't concerned as to any relationship with the charterer.

[319] Q. You don't even know if the Ship was owned or chartered by Coastal? A. I have no idea.

Q. Is that correct? A. That is correct.

Q. Sinclair has no interest whatever in knowing what the arrangements are between the man who is buying the oil and the man he hires to ship it; is that correct? A. That is right. In this case it is a F.O.B. sale.

Q. None of these papers has anything to do with that; is that correct? A. With the charter-party?

Q. Yes. A. No, sir, they have no relationship.

Q. Mr. Woodward, have you ever talked with me before? A. No, sir.

Q. Have you ever talked with Mr. Cardillo before? A. I might have, with Mr. Cardillo. I am not sure. I know Mr. Smith. I don't recall Mr. Cardillo.

Q. Mr. Smith is Mr. Cardillo's partner? A. I believe so.

Q. When did you talk with him? A. Mr. Smith was in the day before yesterday, I believe.

[320] Mr. Underwood: No further questions.

Mr. Cardillo: That is all, your Honor.

The Court: All right; you may step down.

(Witness excused.)

Mr. Cardillo: Libelant rests.

Mr. Underwood: Respondent rests, your Honor.

The Court: I will reserve decision.

Do you want some time to submit additional memoranda?

(Discussion off the record.)

The Court: Both of you file memorandums by the 16th of May.

Excerpt from Deposition of J. M. Patton

[418]

Q. With whom did you have that conversation? A. Mr. Martell.

Q. On what date did you have that conversation? A. On April 28, 1952.

Q. And did you call him or did he call you? [419] A. He called Mr. Winterberger.

Q. And do you occupy the same office with Mr. Winterberger? A. Across the desk.

Q. And that was in April, 1952, and you took the phone call which Mr. Martell made to Mr. Winterberger? A. Yes, sir.

Q. Was Mr. Winterberger absent at that time? A. Mr. Winterberger was out of town, on account of the sickness of his mother.

Excerpt from Deposition of J. C. Martell

[731]

Q. Did you have any conversation with anyone at Sinclair in which provision was made or reference was made to the possibility of the cargo being picked up after April 30? A. No, sir.

Office Supreme Court, U.S.
FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 333

STRATHMORE SHIPPING CO., INC.,
Petitioner,

v.

COASTAL OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Strathmore Shipping Co., Inc., the petitioner above named, prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Second Circuit entered in the above case on April 12, 1957, and the order of said Court entered on May 3, 1957, denying a petition for rehearing.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 8-12)* has not been reported officially but is reported unofficially at

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* References in parentheses are to pages of the printed record.

1957 A.M.C. 992. The opinion of the Court of Appeals for the Second Circuit (R. 221) is reported at 243 F. 2d 97, 1957 A.M.C. 995. The order denying the petition for rehearing is unreported.

Jurisdiction

The judgment and decree of the Court of Appeals for the Second Circuit was made and entered on April 12, 1957, (R. 223), a copy thereof is appended to this petition in the appendix at p. 26. A copy of the court's *per curiam* opinion is appended hereto at pp. 27-28. An order denying the petition for rehearing was filed on May 3, 1957, and a copy thereof is appended to this petition in the appendix at page 30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

In a suit brought by the petitioner under a charter party which required the vessel to tender for loading not before April 20, 1952, nor after April 30, 1952, [the latter date being known as the "cancellation date" since the charterer acquired the right to cancel the charter party if the vessel did not tender by 4 P.M. of that date, and the days between the two dates being generally known as the "laydays",] the petitioner alleged and offered evidence showing that the latter date was orally extended to May 10, 1952, with the understanding that all other terms and conditions of the charter party were to remain the same. The said charter party was introduced in evidence. In its decision, the District Court, in addition to numerous errors of fact, ruled as a matter of law that a further oral understanding between the charterer and the ship-

owner that the vessel was to proceed directly to the loading port under the charter party in dispute upon completion of the discharge of cargo then on board (which discharge was contemplated to take place about the 26th of April to the 1st of May, 1952, or within the layday period) constituted a "substantial change", or in the language of the case of *American Merchant Marine Insurance Co.* v. *Letton*, 9 Fed. 2d 799, cert. den. 271 U. S. 668, under which the Court made its ruling, a term "left open". The Court of Appeals, in a per curiam opinion, affirmed, indicating that there was nothing that "suggests the presence of legal error". The questions presented are:

(1) Whether the language in a charter party that a vessel "proceed with all convenient dispatch" does not require the vessel, once the layday period has commenced, to proceed directly to the loading port without unnecessary or unreasonable delay, or does not prevent the shipowner from engaging the vessel in any other service which would result in such delay.

(2) Whether a charter party containing a cancellation date is rendered null and void in the absence of a provision that, during the layday period the vessel must proceed directly from its last discharge port to the loading port under the charter, despite the presence of a clause requiring the vessel to "proceed with all convenient dispatch"; or, in line with the opinion of the District Court, whether the absence of such a provision constitutes a "term left open".

(3) Whether an oral agreement modifying the terms of a written charter party must be itself reduced to writing and signed by the parties in order to be effective.

Statement

This is a suit in admiralty by Strathmore Shipping Company, Inc., as owner of the vessel "STRATHBAY", to recover damages for the failure of Coastal Oil Company, as charterer, to supply a cargo under a charter party agreement dated March 27, 1952, as amended by an oral agreement of April 18, 1952. By the latter agreement the time within which the vessel might report to the loading port, without the charter being subject to cancellation by the charterer, was extended ten days from April 30 to May 10, 1952. The vessel in fact reported and was duly tendered on May 3, 1952, after the Charterer had sent the owner a purported "cancellation". The charterer denied making the oral agreement, and the existence of the agreement was the principal issue before the trial court.

Despite the overwhelming evidence of the existence of the agreement adduced upon the trial, the District Court handed down a decision replete with erroneous, incomplete, irrelevant, inconsistent and demonstrably inaccurate findings of fact and conclusions of law, dismissing the libel on the merits.

In the District Court's findings of fact alone, seventeen errors were pointed out to the Court of Appeals, in addition to a conclusion of law which is clearly contrary to numerous decisions of this and inferior federal courts. Nevertheless, in a *per curiam* opinion the Court of Appeals affirmed the decree appealed from. In so doing, the Court of Appeals has decided a federal question so as to conflict with the applicable decisions of this Court and has sanctioned such a departure by the District Court from the accepted and usual course of

judicial proceedings as to call for an exercise of this Court's power of supervision.

The negotiations for both the original charter party and the agreement of modification were conducted by the charterer, Coastal Oil Company, through its vice-president and general manager, Mr. James Martell. Acting for Strathmore Shipping Company, Inc., owners of the vessel "STRATHBAY", was Mr. Joseph A. Winterberger, a broker at Simpson, Spence & Young, a large marine brokerage firm.

The original charter party was negotiated between Mr. Winterberger and Mr. Martell prior to, and concluded in the course of a telephone conversation on, March 27, 1952. The important terms of the said charter party, in so far as this dispute is concerned, were that delivery of the vessel was to be tendered at a United State gulf port between April 20 and April 30, 1952 (generally called the "lay days"), with April 30, 1952, being the cancelling date. With regard to the cancelling date, the charter party provided that if the vessel were not ready to load by 4:00 P.M. on that date, then the charterer would have the option of cancelling the charter party by giving the owner notice of such cancellation within 24 hours after the cancelling date; otherwise the charter party was to remain in full force and effect. The vessel's expected readiness was indicated to be about April 22. The rate of freight was based on the former United States Maritime Commission rate for a T2 type tanker, and in this instance the freight rate was such rate plus 190% thereof. (As a matter of convenience, and inasmuch as the said rate is generally referred to in the shipping market as "USMC plus 190", this method of designa-

tion will be used hereinafter in respect of references to freight rates.)

Upon reaching an agreement with Martell on March 27, 1952, Mr. Winterberger wrote a letter to the owner and the charterer, in accordance with the usual custom, setting forth the terms of the agreement, which letter is generally known as a "fixture letter". Subsequently Mr. Winterberger prepared a formal charter party, dated it March 27, 1952, and submitted it to the owner for signature. After the owner signed the charter party it was forwarded to the charterer with the usual form of covering letter stating that the charter party was enclosed, duly executed by the owner, and requesting that it be executed by the charterer. It was then executed by the charterer and returned to the broker.

Subsequently the vessel encountered some minor delays which made it apparent that she would not arrive by the date of expected readiness, and also made it possible that she might not arrive by the cancelling date, April 30, 1952. As a result, Captain John T. Vatis, President of the owner corporation, instructed Mr. Winterberger to communicate with the charterer and request an extension in the cancelling date of three days, that is to May 3, 1952, in exchange for which the owner was willing to reduce the freight rate from "USMC plus 190" to "USMC plus 170". Mr. Winterberger testified that he telephoned to Mr. Martell on April 8 and made the said request (R. 45). However, Mr. Martell did not agree to that proposal, as he felt the 20-point difference was insufficient. Thereafter, Mr. Winterberger communicated again with Mr. Martell from time to time in further efforts to obtain an extension on those terms and also kept Mr. Martell informed as to the position of the vessel (R. 46).

On April 17, however, Mr. Winterberger was instructed by the owners to make a further proposal to Mr. Martell, which he did. The proposal was that if the charterer would extend the cancelling date by 10 days, that is to May 10, 1952, owners would reduce the freight rate by 50 points, that is from USMC plus 190 to USMC plus 140 (R. 46). Mr. Martell, after giving the proposal some consideration, felt that it was worth more than a 50-point reduction. Mr. Martell then made a counter-proposal to grant the 10-day extension in consideration of a reduction of 90 points, to USMC plus 100 (R. 47). Apparently, the owners were not quite satisfied with this counter-proposal, and authorized Mr. Winterberger to propose, in reply, a reduction of the rate to USMC plus 140 if the vessel arrived at the loading port by April 30, and USMC plus 120 if she arrived by May 10 (R. 47, 103-4). At the same time the owners authorized Mr. Winterberger to use his discretion, in the event that the proposal were not acceptable, and offer to reduce the rate to a flat USMC plus 120 for the 10-day extension, regardless of whether or not the vessel tendered by April 30 (R. 48, 104). Accordingly, Mr. Winterberger telephoned Mr. Martell on April 18 and proposed the 140-120 offer. This was not accepted by Mr. Martell, but he in turn, however, made a counter-offer to reduce the rate to USMC plus 120 should the vessel arrive by April 30, and to USMC plus 100 should the vessel arrive after April 30 (R. 47, 123). At that point Mr. Winterberger decided to exercise the discretion granted to him and he countered by offering to reduce the rate from USMC plus 190 to USMC plus 120 for a straight 10-day extension. Mr. Winterberger testified that this offer was accepted by Mr. Martell (R. 48-9). It was further agreed that all of the other

terms and conditions of the original charter party were to apply to the new agreement (R. 49). The date of the acceptance and agreement was April 18, 1952 (R. 50, 104). The issue between the parties arises from the fact that Mr. Martell subsequently denied having so agreed.

After the agreement was reached, Mr. Winterberger then advised the owner thereof (R. 104), and again following the customary practice, he prepared an addendum reflecting its terms (R. 49). He forwarded the said addendum to the owner for signature, with the customary covering letter, and obtained the owner's signature accordingly (R. 50-51). When he received the addendum duly executed by the owner, he similarly forwarded it, on April 19, to the charterer for execution by the charterer, again under cover of the customary letter, reflecting a consummated agreement, requesting such execution (R. 51).

The following business day, which was Monday, April 21, Mr. Martell telephoned Mr. Winterberger and stated that he was quite disturbed as a result of having heard a rumor to the effect that the vessel had taken on an engagement for a cross-gulf voyage prior to tendering under the charter party with the respondent (R. 125). [It should be borne in mind that, as a practical matter, any such rumor must have been based on the existence of the agreement of extension since it would have been physically impossible, by Martell's own testimony, for the vessel to have made any such cross-gulf voyage and still arrive by her original cancelling date.] Martell also stated that he believed the owner had misrepresented the position of the vessel from the time of the original fixture (R. 52), claiming in effect

that on March 27, 1952, she was not in position to have made the expected readiness date of April 22 as set forth in the original charter party. Mr. Winterberger assured him that there had been no intermediate fixture (R. 53); and that the information that he, Winterberger, had given to Mr. Martell from time to time as to the vessel's position was quite accurate and showed that if it had not been for the delays, which were not the fault of the vessel, the vessel would have made the expected readiness date (R. 52-3, 125-6). At the same time Mr. Winterberger suggested to Martel that he telephone the owner directly for confirmation of the information thus given (R. 53).

Mr. Martell then telephoned the office of the libellant owner and spoke to Mr. A. T. Yatis who confirmed Mr. Winterberger's advice to Mr. Martell.

On the following day Mr. Martell again telephoned Mr. Winterberger. In this conversation Mr. Martell stated that he had not remembered that the extension to which he agreed was for as long as 10 days (R. 55), but in any event he wanted a clause in the addendum to the effect that the vessel would be obliged under the charter with the respondent to proceed directly to the loading port immediately after completion of the discharge of the cargo which she was then currently carrying. Mr. Winterberger replied that he saw no objection to such a provision but that he would request the owner's approval. He did so, and, the owner indicating that it had no objection to such a provision, Mr. Winterberger called Mr. Martell and told him that it would be permissable for Mr. Martell to add a clause of such nature as would cover the point, if he felt such a provision necessary. Later Mr. Martell's secretary

called and asked Mr. Winterberger to dictate a clause which would adequately cover the situation, which he did (R. 55-6). The clause in question provided that the vessel was to proceed immediately to Corpus Christi (which had been indicated earlier as the probable loading port, but which was subject to change to any other United States Gulf port in accordance with the charter party) upon completion of the vessel's discharge of cargo at New Orleans. Mr. Martell caused the said clause to be typed on the original addendum, which had been previously signed by Captain Vatis on behalf of the libellant and forwarded to Mr. Martell by Mr. Winterberger (R. 56, 147).

The next evidence of any communication by Mr. Martell was on April 28, when he telephoned the office of Simpson, Spence & Young, and finding Mr. Winterberger out, spoke with Mr. James Patton, and he advised him that the vessel "STRATHBAY" was still to load at Corpus Christi in Texas (R. 199). This followed the custom of giving final and definite instructions as to the selection of a loading port prior to the vessel's readiness for sailing from her last port (R.38). Mr. Patton reported this information to Captain John Vatis in the owner's office (R. 199) and the latter transmitted the said instructions by letter dated the same day, to wit: April 28, 1952, to the Master of the vessel (R. 37).

In one of numerous contradictions with the testimony of other witnesses, Mr. Martell denied having talked with Mr. Patton about this matter at any time (R. 170). Mr. Winterberger was away at the time of this conversation and did not return to his office until the afternoon of the 29th, (R. 38-9), so Mr. Martell

could not have talked to him, as he claimed (R. 128, 172).

After returning to his office late the following day, April 29, Mr. Winterberger found a memorandum of the message transmitted by Mr. Patton, and checked with the owner in respect of the vessel's position. The owner estimated the vessel's arrival as May 1 or 2 and he relayed this information to the respondent (R. 58). The records of the Sinclair Refining Company indicated that on the same date they received corresponding advices from the respondent. The said advices were confirmed in a letter from the Sinclair Refining Company to Mr. Martell, which letter was erroneously dated April 6, 1952 but obviously intended as May 6, 1952, and which was received by Mr. Martell on May 7, 1952.

The Sinclair records then indicate that on the next day, April 30, Mr. C. R. Campbell, general manager of the Wholesale Sales Department of the Sinclair Refining Company, telephoned to Mr. Martell and advised that they would be unable to load the vessel after 12:01 A.M. on Friday, May 2, that is to say, one minute after midnight of May 1. Upon receipt of that information, Mr. Martell telephoned Mr. Winterberger and advised that if the vessel did not arrive at Corpus Christi by midnight of May 1, the refinery would be on strike. Winterberger suggested to him that he try to get a cargo at Aruba to replace the cargo from Sinclair or alternatively he would try to get the Pure Oil Company to advance their lay days and accept the vessel at an earlier date (R. 59). Mr. Martell gave no reaction to these suggestions but instead, in the afternoon of that day, April 30, he consulted counsel as to his position (R. 180-181).

On the following day, May 1, Mr. Martell telephoned Mr. Winterberger and told him to advise the owner that the "STRATHBAY" charter was cancelled. Mr. Winterberger replied that Martell had an agreement with the owner, but Martell asserted that the representations of the vessel's position, on which the agreement was based, had been false. Winterberger reported this conversation to the owner, who instructed him to tell Martell that they would not accept the cancellation and to send the respondent a telegram to that effect, which he did (R. 60). The purported advice of cancellation was confirmed by letter served upon the libellant at 12:20 P.M. on May 1, 1952, by a representative of the respondent's counsel. At this time the vessel was still at New Orleans, Louisiana, from which port she did not leave until 10 o'clock that night, and from whence she proceeded to Corpus Christi to tender under the charter.

The vessel arrived at Corpus Christi in the early afternoon of May 3 and the Master sent a telegram to the respondent advising that the vessel was tendering and was ready in all respects to receive her cargo (R. 111). A further telegram of tender was sent by Messrs. Simpson, Spence & Young and received by the respondent on May 5 (R. 177). The tender of the vessel was not accepted (R. 111). Nor did the respondent ever reply to the telegram of May 1 or that of May 5. Libellant first became aware of respondent's specific denial of the existence of the agreement upon receipt of answers to requests for admissions on November 1, 1955 (R. 20, 23), some 3½ years after the dispute arose and Mr. Winterberger first became aware of this denial when so advised by libellant's counsel on the day of his deposition before trial (November 4, 1955, almost 3½ years after the dispute arose (R. 62)).

Mr. Martell was the sole witness called on behalf of the respondent. While his testimony essentially confirmed the proposals and counter-proposals as outlined above, he denied acceptance of the final offer made by libellant. It is not our intention here to burden the Court with a recitation of the numberous respects in which Mr. Martell's testimony was self-contradictory and at times outlandishly improbable. Suffice it to say that, since his testimony contradicted that of every other witness called, he was obliged to say that each of the other witnesses, even including his own assistant, was mistaken in the testimony each of them gave (Winterberger—R. 184, Patton—R. 184, Vatis—R. 184, Marron—R. 185). He also contradicted the documentary evidence of the Sinclair Refining Company, maintaining that he advised them on the April 28 (rather than on April 29, as their records indicated) that the vessel would arrive at their terminal on May 1st or 2nd (R. 172). He could hardly categorically deny all the facts contained in the business records of Sinclair. He did maintain, though, that on April 28, the same day he told Sinclair that the vessel would arrive after April 30th, he told Mr. Winterberger that if the vessel did not arrive by April 30, he would cancel the charter (R. 172).

All the factors extraneous to the critical telephone conversation, coherently bore out the testimony of libellant's witnesses and required the conclusion that the ten-day extension had been agreed upon in that telephone conversation. In order, these factors are:

1. The agreement providing for the extension was in fact drawn, signed by the libellant and forwarded to the respondent.

2. The letter under cover of which the addendum was forwarded to the respondent blandly requested, in the usual manner, that the respondent execute and return the agreement. The request was not precatory but evidenced merely normal business courtesy.

3. The respondent actually inserted into its copy of the addendum a provision preventing intermediate voyages.

4. After the extension agreement was reached, the libellant entered into a charter for a subsequent voyage providing for expected readiness on May 19, or about the time performance under this charter would be completed. Had the agreement not been made, the owner would not have left the vessel without employment between May 1 and May 19.

5. A memorandum in Mr. Martell's file detailing the progress of the vessel was in almost exact conformity with the office log from which Mr. Vatis testified he gave Mr. Martell the information which Mr. Martell denied receiving from him.

6. The respondent notified Sinclair, as late as April 29, that the vessel would call at the loading port on May 1 or 2.

7. Sinclair by letter to the respondent on May 6, confirmed this advice and indicated that the only reason the vessel could not load was because of a work stoppage.

8. On April 28, before he was advised by the Sinclair Refining Co. of the strike, but when if was quite obvious in fact, and equally obvious to Mr. Martell, that the vessel would not arrive by April 30 (the ves-

sel then being at New Orleans), Mr. Martell advised the owner that the vessel was still to load at Corpus Christi, Texas.

9. On receipt of such advice the ship owner prepared and sent a letter instructing the Master accordingly.

10. On May 1, after receiving the purported notice of cancellation, and well prior to the vessel's actual departure from New Orleans, the libellant nevertheless caused the vessel to proceed to the loading port which would obviously be strikebound at the time of the vessel's arrival.

11. A diary kept by Mr. Winterberger, though admittedly for his personal information and guidance, detailed most of the circumstances as they occurred.

Each of the above factors substantiates and corroborates the testimony on behalf of libellant. Taken together, they impellingly lead to the inevitable conclusion that the decision of the trial court was clearly erroneous and that the evidence clearly required a contrary decision.

Reasons for Granting the Writ

1. The decision below should be reviewed because it erroneously decided an important question of admiralty law contrary to the settled rule in this and inferior courts of the United States, and also contrary to the recognized practice in the shipping industry. If the said decision were left to stand, the result would be a complete disruption not only of the general understanding of the intent and meaning of the "proceed with dispatch" clauses, but also of the requirements for a valid charter party.

It was error for the Court of Appeals to affirm the action of the District Court in applying the rule of *American Merchant Maine Insurance Co.* v. *Letton*, 9 F. 2d 799, to the case at hand, for the requirement in a charter party that a vessel "proceed with all convenient dispatch" prevented the vessel from making a commitment for an intermediate voyage once lay-days had commenced under this charter party.

In item 4 of the findings of fact in his opinion (R. 10), the District Court Judge, by assuming that a specific clause was necessary in the addendum in order to require the vessel to proceed directly to its loading port under the charter in dispute after completion of discharge under the prior charter, committed an error of law. In treating with conclusions of law, that court again refers to the insertion of such a specific requirement in the addendum, as "A substantial charge * * * subsequent to the alleged oral agreement," (R. 12) and it then relies on the case of *American Merchant Marine Ins. Co.* v. *Letton, supra,* in support of that finding and its consequent conclusion and that no agreement was reached on April 18.

In the cited case, the opinion by Judge Manton holds that an informal agreement is not binding, is not in fact an agreement, unless there is agreement on the material terms; such terms may not be "left open" to be settled later.

The insertion in the addendum to which the District Court Judge referred, read as follows: "It is understood and agreed that immediately upon discharge of molasses cargo now en route to New Orleans, vessel to proceed to Sinclair Oil Company Terminal, Corpus Christi, to load under this charter."

We submit that in following the *Letton* case (the rule of which is quite valid where applicable) the District Court has wandered completely from the proper interpretation of the legal effect of the original charter party, and the legal effect of the oral agreement of April 18, 1952 as set down in the addendum prior to the insertion of the new clause by the charterer.

There was *no* term, material or otherwise, "left open" in the oral agreement contained in the "addendum" as executed by the libellant and forwarded to the respondent. That addendum incorporated by reference the provisions of the written charter party of March 27, 1952. That charter party required the vessel to proceed to the loading port "with all convenient dispatch", which provision, as a matter of law, prohibited the vessel from making an intermediate "cross-gulf voyage", because it required the vessel to proceed to the loading port without any unreasonable or intentional delays. Pertinent portions of the charter party are contained in the Appendix hereto at pp. 31-32; and the addendum containing the inserted clause is printed at page 33 of the Appendix.

In *Olsen* v. *Hunter-Benn & Co.*, 54 Fed. 530, where the charter specified the vessel should proceed "with all convenient speed", and the owner took an unreasonably long time discharging cargo under her existing employment, the charterer was excused from loading. The owner's suit to recover for the charterer's failure to do so was dismissed. *A fortiori*, if the owner actually entered into a new engagement not then existing, which would delay the vessel that much more, owner's breach would be compounded and charterer would necessarily be excused from loading.

Without considering what is regarded as fundamental in the shipping industry, it is elementary that where a vessel is required to report for loading as soon as possible within her "lay days", she cannot, once the lay days have commenced, delay her tender under a charter party by entering into a new engagement for another voyage. In the instant case, the lay days commenced on April 20, and terminated on the cancelling date (April 30 under the original charter). By the agreement of April 18, the lay days were extended until May 10, but in view of the fact that all other terms and conditions of the original charter were preserved, it is obvious that the commencement of the lay days was not changed. Moreover, in view of the further fact that as early as April 8, or by respondent's own admission, April 10, it was known to the libellant that the vessel might have difficulty making her cancelling date, the libellant at no time subsequent to acquiring such knowledge would have been justified legally in entering into any other transaction which would further delay the vessel.

In still another respect, apart from both the cancelling date and the specific requirement of dispatch, the conversations at the time of the oral agreement which set the expected time of arrival as May 3 or earlier, independently imported the requirement that the vessel might not delay for an intermediate voyage or any other avoidable cause. Scrutton, in "Charter Parties and Bills of Lading," says,

> "The words 'expected ready to load' by a certain date mean that in view of the facts known to the promisor when making his contract he honestly expects that the vessel will be ready as stated and that his expectation is based on reasonable grounds.

> The promise is broken if either he does not honestly expect, or if he has not reasonable grounds for his expectation." (Fifteenth Edition, p. 89-90.)

It is stated in Poor on "Charter Parties and Ocean Bills of Lading",

> "A misstatement of the vessel's position, even though oral and not incorporated in the charter, permits the charterer to refuse to load." (Fourth Edition, § 21, p. 58.)

If a statement of the ship's position by the owner, upon which, of course, estimates of arrival are based, is incorrect, the charterer may lawfully refuse to load even if the vessel makes her cancelling date. Poor, § 22, p. 59.

Thus in no sense was the prohibition of an intermediate voyage lacking in the oral agreement, and the specific provision on the subject, which was accepted by owners and added to the addendum in the charterer's office, was surplusage only. That the respondent should have requested it, and that libellant should have had no objection whatsoever to writing it in, did not in any way make it an added requirement of the contract; it only repeated a requirement already there.

In *Lowber* v. *Bangs*, 69 U. S. (2 Wall.) 728, this Court held that a provision in a charter party that the vessel proceed "with all possible dispatch" to the loading port, precluded the vessel from making an intermediate voyage, and the vessel having done so, the charterers were warranted in considering themselves released from the charter party.

Similarly, in *Antole* v. *Gill*, 3 Fed. 128, affd. 7 Fed. 487, it was held that a provision that the ship would "proceed without delay to Baltimore" was not com-

plied with when the vessel remained at Genoa for 31 days discharging cargo.

In the case of *Hildebrand v. Geneva Mills Co.*, 32 F. 2d 343, in which no date for sailing from the discharge port was set, the court said at page 348:

> "* * * The only duty resting upon the vessel was to proceed upon the voyage with reasonable dispatch, and the burden was upon the charterer to show the vessel's failure to perform its duty in this respect."

If the vessel was required to proceed with reasonable dispatch it could not, therefore, unreasonably delay sailing for the loading port.

In *Rosasco* v. *Pitch Pine Lumber Co.*, 138 Fed. 25, affg. 121 Fed. 437, cert. den. 198 U. S. 587, the vessel tendered before the cancelling date provided in the charter party. The court held that the vessel had thus not unreasonably delayed sailing from the discharge port and that a provision reading "vessel to sail 48 hours after orders are given" was not a requirement that the vessel leave her last discharge port 48 hours after the designation of the loading port. The court said at page 27:

> "* * * The charterer was amply secured by other provisions, found in the printed part of the charter, providing that the vessel should 'proceed with all possible dispatch from Venice to loading port.' The charterer needed no other protection than this, coupled with its right to cancel * * *."

And, as was said in *Olsen* v. *Hunter-Benn Co.*, 54 Fed. 530, at page 531:

> "* * * I consider that the stipulation that the vessel 'should, with all convenient speed, proceed,' as equivalent to a stipulation that she should pro-

> ceed without unnecessary delay. And the shipowner, by his contract, impliedly agreed that his vessel should proceed without unreasonable delay. This was a condition precedent, as well as an agreement."

While the meaning of the particular phrase here involved, "proceed with all convenient dispatch," appears never to have been passed upon by this Court, although it is printed in several standard forms of charter parties, the foregoing cases involving similar expressions all demonstrate that, by this expression, the vessel is prohibited from unnecessarily or unreasonably delaying to proceed on the voyage. This is especially true once the lay-days, the period during which delivery of the vessel was promised, have commenced.

It thus appears to have been a well settled rule of law that a provision requiring a vessel to proceed to the loading port "with all convenient dispatch" prevented the making, once lay-days had commenced, of a commitment for an intermediate voyage. To hold now that the addition of such a prohibition supplied a term not already included in the agreement, or added a term so as to alter the rights of the parties, is inconsistent with what we conceive to be that well settled rule.

2. The decision below should be reviewed because it was error to hold that the insertion in the addendum of the clause prohibiting an intermediate voyage added a necessary provision for a complete agreement and that, accordingly, in the absence of that clause the agreement between the parties was null and void.

Even assuming that, before the insertion of the clause, the libellant was not already prohibited from

engaging the vessel "STRATHBAY" for a cross-gulf voyage, and if, further, in applying the rule of the *Letton* case, *supra,* the District Court Judge assumed that the absence of the language which was added to the addendum in effect left a material term open, then such assumption by the trial court was equally erroneous. Even if we were to assume, contrary to fact, that the original charter party had not required the vessel to proceed with dispatch, it still would have been a complete and binding charter party and, as a matter of law, the agreement set down in the addendum would likewise be complete. A cross-gulf voyage would be permitted, provided it did not delay the vessel beyond the new cancelling date. Any subsequent provision to prohibit it would be a *change,* not the settling of a term left open. The testimony is clear that there was no mention by either party of any cross-gulf voyage prohibition at the time of the critical conversation of April 18, nor at any time before April 21, and consequently the clause had not even been considered prior to or at the time of the oral agreement. Therefore, there was no omission of a material term, nor of any term, material or otherwise, in the contemplation of the parties at the time the agreement was reached. Rather, all of the terms intended to be agreed upon by the parties on April 18th, were in fact agreed upon, and consequently such agreement was immediately valid and binding. One need not go outside the *Letton* case, *supra,* for authority on this point. There, at page 801, Judge Manton stated:

> "All the terms which the parties *intend* to *include* in the formal agreement must be shown to have been agreed upon, to constitute a meeting of the minds of the parties to make the contract enforceable." (Emphasis supplied)

Since it is clear that there was no discussion before April 21st of the insertion of the clause prohibiting an intermediate voyage, it cannot have been one of the terms which the parties intended to include on April 18th. An agreement thereafter to add the additional term did not, therefore, render their prior agreement a nullity.

3. The decision of the court below should be reviewed because it erroneously holds that an admiralty contract is void unless it is reduced to a writing signed by both parties to be charged.

Even assuming, contrary to the basic law, that the original charter party had not prohibited an intermediate voyage, and further assuming that omission of reference to that subject somehow made incomplete an agreement otherwise complete, the lower courts were in error in applying the *Letton* case, *supra*; for the testimony is clear that the term was subsequently agreed upon by both parties. The charterer requested the term and the owners readily agreed to it, and the charterer was advised to insert it in the addendum if it was felt necessary. The charterer did in fact cause its insertion in the addendum. The addendum was, of course, already signed by the owner, and to hold that the charterer's failure to sign a writing evidencing an existing maritime contract makes that contract a nullity, is clear error.

As was said in *Northern Star S.S. co.* v. *Kansas Milling Co.*, 75 F. Supp. 534:

> "The fact that a contract is not in writing does not bar a suit thereon in admiralty. *American-Hawaiian S.S. Co.* v. *Willfuehr*, 274 Fed. 214, aff'd. sub. now *U. S. F. & G. Co.* v. *American-Hawaiian S.S. Co.*, 280 Fed. 1023."

The validity of this rule can hardly be questioned. See *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 39 S. Ct. 112, *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 40 S. Ct. 438.

It is thus evident that on whatever premise the court below approved the application of the principles of the *Letton* case, *supra*, to the case at bar, it was in error.

4. The questions presented in this case are of great and recurring significance to the shipping industry and to the admiralty bar. Charter parties are customarily negotiated by brokers for the respective parties and concluded orally, often when the parties are separated by great distances. Performance under charter parties is often commenced, and even completed at times, before the charter parties have been executed and delivered by the parties thereto. To deny the effectiveness of such agreements until they have been reduced to a signed agreement, or even to cast doubt on their validity during the intervening period, would have dire and far-reaching effect upon the industry.

So, too, the requirement in a charter party that a vessel "proceed with all convenient dispatch" has long been held to have settled the rights of the parties. It is a term of art the effect of which certainly is accepted to be the prohibition against the vessel's making an intermediate fixture, once lay-days have commenced.

As previously indicated seventeen errors in the District Court's findings of fact, any one of which would prejudice petitioner's rights, were pointed out to the Court of Appeals. Taken together, they warrant an exercise of this Court's power of review. In addi-

tion, when those errors are coupled with the error of law here pointed out, this Court should grant a writ of certiorari.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN R. SHENEMAN,
Proctor for Petitioner,
Office & P.O. Address:
52 Broadway,
New York, New York.

JOSEPH CARDILLO, JR.,
Of Counsel

APPENDIX

Judgment and Decree of the Court of Appeals

(Record, page 223)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of April one thousand nine hundred and fifty-seven.

Present:

HON. CARROLL C. HINCKS,
HON. POTTER STEWART,
HON. J. EDWARD LUMBARD,
Circuit Judges.

STRATHMORE SHIPPING COMPANY,
Libellant-Appellant

v.

COASTAL OIL COMPANY,
Respondent-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

Opinion of Court of Appeals Affirming District Court Decree

(R. 221)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term 1956.

(Argued March 11, 1957 Decided April 12, 1957.)

Docket No. 24282

STRATHMORE SHIPPING COMPANY, INC.,

Libellant-Appellant,

v.

COASTAL OIL COMPANY,

Respondent-Appellee.

Before:

HINCKS, STEWART and LUMBARD,

Circuit Judges.

The libellant appeals from a decree in admiralty of the United States District Court for the Southern District of New York, Cashin, J., dismissing on the merits its libel for breach of a charter-party. *Affirmed.*

JOSEPH CARDILLO, JR., of Cardillo & Smith, New York, N. Y. (Charles H. Bridge, Jr., on the brief), *for libellant-appellant.*

EUGENE UNDERWOOD, of Burlingham, Hupper & Kennedy, New York, N. Y. (Hervey C. Allen, on the brief), *for respondent-appellee.*

PER CURIAM:

Because the libellant tendered the tank ship Strathbay later than the date provided therefor in its written charter to the respondent, the respondent had canceled the charter by notice according to its terms. The libellant, not disputing that this ordinarily would end all obligations on the part of the respondent, claims that the charter had been orally extended with the result that the ship was tendered on time.

The trial before Judge Cashin was solely concerned with the question whether the parties had agreed to the oral extension. The evidence was conflicting. The burden of proof was on the libellant.

The proofs were left in such posture that Judge Cashin's findings must be upheld as not clearly erroneous. *Fodera* v. *Booth American Shipping Corp.*, 2 Cir., 159 F. 2d 795; *McAllister* v. *United States*, 348 U. S. 19, 20. And we find nothing in his discussion of the conclusion reached, and nothing in the record, that suggests the presence of legal error.

Affirmed.

Per Curiam Opinion Denying Petition for Rehearing

(Record, page 232)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

STRATHMORE SHIPPING CO., INC.,
Libellant-Appellant

v.

COASTAL OIL CO.,
Respondent-Appellee

Before

HINCKS, STEWART and LUMBARD, *Circuit Judges*.

On Petition for Rehearing

JOSEPH CARDILLO, JR., of Cardillo & Smith, New York, N. Y., for *libellant-appellant*

PER CURIAM

Petition for rehearing denied.

CCH
PS
JEL
U. S. C. J. J.

Order Denying Petition for Rehearing

(Record, page 234)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of May, one thousand nine hundred and fifty-seven.

Present:

HON. CARROLL C. HINCKS,
HON. POTTER STEWART,
HON. J. EDWARD LUMBARD,
Circuit Judges.

STRATHMORE SHIPPING CO., INC.,
Libellant-Appellant

v.

COASTAL OIL CO.,
Respondent-Appellee

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Excerpts from Charter Party

(Libellant's Exhibit 1
in court below)

PREAMBLE

CHARTER PARTY made as of March 27, 1952, at New York, New York, by and between STRATHMORE SHIPPING COMPANY, INC. Owner (hereinafter called the "Owner") of the good American SS "STRATHBAY" (hereinafter called the "Vessel") and COASTAL OIL COMPANY, Charterer (hereinafter called the "Charterer").

The Vessel shall proceed with all convenient dispatch to the port or ports of loading, or so near thereto as she may safely get, always afloat, and there receive from the Charterer or supplier the cargo described in Part I, and being so loaded shall forthwith proceed as ordered on signing bills of lading to the port or ports of discharge, or so near thereto as she may safely get always afloat; and there discharge the cargo; all subject to the terms, provisions, exemptions, and limitations contained or incorporated in this Charter Party, which shall include the foregoing preamble and Parts I and II.

CLAUSE 3

Readiness and Cancellation Date

Laytime shall not commence before the readiness date named in Part I, unless otherwise provided in this Charter, or unless the Charterer accepts a notice of readiness or orders or permits the Vessel to berth before that date, or otherwise waives the provisions of this paragraph. If the Vessel is not ready to load by 4:00 p.m. (local time) on the cancelling date named in Part I, the Charterer shall have the option of cancelling this Charter by giving the Owner notice of such cancellation within twenty-four (24) hours after the cancelling date; otherwise this Charter shall remain in full force and effect. The Charterer may in its notice of cancellation specify that it will nevertheless accept the Vessel if she is ready to load on or before a date or time that Charterer may designate in such notice in which event the Owner may at its option either treat this Charter Party as cancelled or tender the Vessel on or before the date named by the Charterer in its notice, whereupon this Charter shall remain in full force and effect.

Addendum to Charter Party

(Respondent's Exhibit "A" in court below)

ADDENDUM NO. 1

April 18, 1952.

Referring to Charter Party dated March 27, 1952, between Strathmore Shipping Company, Inc., Owners of the American S/S "STRATHBAY", and Coastal Oil Company, Charterers, it is hereby understood and agreed:

THAT: In consideration for extending the cancelling date from April 30th to May 10th, 1952, the rate for freight, demurrage and extras shall be reduced from Former U.S.M.C. T-2 Rate plus 190 centum to Former U.S.M.C. T-2 Rate plus 120 centum. It is understood and agreed that immediately upon discharge of molasses cargo now en route to New Orleans, vessel to proceed to Sinclair Oil Company Terminal, Corpus Christi, to load under this charter.

All other terms conditions and exceptions to Charter Party to remain unaltered.

Signed in duplicate.

STRATHMORE SHIPPING COMPANY, INC.
Owners of the Amer. S/S "STRATHBAY".

Witness the signature of:
John T. Vatis

/s/ A. T. Vatis

/s/ John T. Vatis

By .....

Witness the signature of: COASTAL OIL COMPANY

.....

By .....

Office - Supreme Court, U.S.
FILED
AUG 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 333

STRATHMORE SHIPPING CO., INC.,
Petitioner,

against

COASTAL OIL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE UNDERWOOD,
HERVEY C. ALLEN,
Counsel for Respondent.
26 Broadway,
New York 4, New York.

Supreme Court of the United States

October Term, 1957

No.

STRATHMORE SHIPPING CO., INC.,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Question Presented

No question of law is presented by this petition. The sole issue is whether this Court will review the District Court's finding of fact that no oral agreement was made to extend the cancelling date of the STRATHBAY charter from April 30, 1952 to May 10, 1952.

Statement

All negotiations for an extension of the cancelling date were had in telephone conversations between petitioner's chartering broker, Joseph Winterberger, and respondent's vice-president, James Martell, both of whom testified in

General Pictures Corp. v. Western Electric Co., 304 U. S. 175, 178), we shall not here undertake to detail all the conflicts in the testimony or the evidence negating the making of the alleged oral agreement. By way of example we point out only that although petitioner states that it and Winterberger did not become aware of respondent's denial of the making of the alleged agreement until November 1955 (Pet., p. 12), this is in direct conflict not only with Martell's testimony that on April 21, 1952 he told Winterberger "very definitely that we had not agreed to an extension (R. 126)", but also with Winterberger's own initial spontaneous outburst on his deposition (R. 90). The District Court's findings are in accord (Findings 3 and 5, R. 10).

Petitioner also conveniently fails to mention any evidence negating the making of the alleged extension agreement though there was much of it, including some from petitioner's own witnesses. For example, note the admitted alterations in Winterberger's office diary (Exh. A), including, in particular, his erasure of the word "agreed" after the very proposal claimed to have been agreed to by respondent (R. 82).

As the Court of Appeals noted, the evidence was "conflicting" (Petitioner's Appendix, p. 28). This is not the place to review conflicts of evidence or the fact findings of the Courts below. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U. S. 498, 503; *McAllister v. United States*, 348 U. S. 19, 20.

Argument

As indicated above, the sole issue on the trial was whether, in a telephone conversation between Winterberger and Martell on or about April 18, 1952, Martell accepted, or did not accept, Winterberger's proposal that he extend the cancelling date of the charter from April 30 to

May 10, 1952. Obviously the District Court's determination on this narrow issue is of no importance to anyone other than the parties to this case. The credibility of Martell versus Winterberger was for the District Judge who found Martell's testimony "in substance credible" (R. 12). *Hoode v. Olsen*, 326 U. S. 271, 279; *Broadcast Music, Inc., v. Havana Madrid Restaurant Corp.*, 2 Cir., 175 F. 2d 77, 80.

No question of interpreting the charter-party language that "the Vessel shall proceed with all convenient dispatch" to the loading port arose or was decided by either the District Court or the Court of Appeals and neither court's decision has the slightest significance either to the "shipping industry" or "admiralty law" (Pet., p. 24). The District Court merely adverted to the change in the proposed written addendum requiring the vessel to proceed to Corpus Christi immediately upon discharge of her molasses cargo as one of several "facts" supporting respondent's version of the earlier telephone conversation between Martell and Winterberger, in addition to "Besides" the testimony of Martell which it found "in substance credible" (R. 11-12). No question of law as to the meaning of the phrase "all convenient dispatch" was in any way involved or decided. The Court simply felt that since part of the telephone conversation in which the alleged oral agreement was claimed by petitioner to have been made, the parties added a special clause to the proposed written addendum, this fact tended to provide some additional support for the finding that an agreement was not reached in the prior telephone conversation.

Petitioner has no basis whatever concerning what petitioner terms "well established fundamental in the shipping industry" (Pet., p. 24), nor was there any evidence that any of the negotiations dealing with the change in the proposed addendum were familiar with what petitioner says is so "fundamental". On the contrary, it is clearly to be inferred from

the direct testimony of petitioner's broker, Winterberger, that he did not regard the original charter provision for "convenient dispatch" as precluding a short intermediate cross-Gulf voyage if the cancelling date should be extended to May 10. He testified that the vessel was to report "on this charter with convenient dispatch" and that "with a sufficient time it was conceivable that she could have made a short voyage before reporting on the Coastal charter" (R. 55), and before dictating the clause to be inserted in the proposed addendum, he found it necessary to obtain petitioner's approval (R. 55). Similarly, Martell clearly regarded the insertion of the clause as necessary and important from respondent's standpoint (R. 126, 146-147). In sum, the insertion of the clause was mutually regarded as needed to cover something that had been "left open" in the oral negotiations and, whether technically a "change" or not, the District Court properly inferred that putting it in the addendum militated against a complete and binding oral agreement's having been reached in the earlier telephone conversation between Winterberger and Martell, as claimed by petitioner.

The District Court's reference to the fact that such a change was made in the addendum plainly does not conflict in any sense with any of the decisions or authorities referred to by petitioner. We should perhaps add, however, that it is far from clear law that where, as here, the charter grants the charterer the option to cancel upon the failure of the vessel to arrive by a specified date, the charterer may cancel if the vessel arrives before that date on the ground that she did not proceed with reasonable or convenient dispatch. *Rosasco v. Pitch Pine Lumber Co.*, 2 Cir., 138 F. 25, affirming 131 F. 437, cert. den. 198 U. S. 585, implies, at least, that under such circumstances the charterer may not cancel but may only sue for damages in doubtful remedy at best. Indeed, even where there is no cancelling date in the charter, as in *Olsen v. Hunter-Bremner Co.*, 54 F. 559, and *London v. Brock*, 2 Wall. 169 U. S.

728 (Pet., pp. 19-20), there is respectable authority that failure of the vessel to proceed with reasonable dispatch does not entitle the charterer to cancel unless the delay becomes so substantial as to frustrate the object of the charter. *Hildebrand v. Geneva Mill Co.*, D. C. Ala., 32 F. 2d 343, 348; *Scrutton, Charter Parties and Bills of Lading*, 16th Ed., pp. 109-11, collecting English cases.

Petitioner's assertion that this case involves a question whether an oral agreement modifying a written charter must be reduced to writing and signed by the parties in order to be effective (Pet., pp. 3, 23-24) can only be described as spurious. Respondent expressly conceded at the opening of the trial that "if a new oral agreement can be proved, it is perfectly legal" and that the only issue was the question of fact whether or not the oral agreement was made (R. 29). The District Judge himself stated expressly that the only question was "the factual one" whether the alleged extension agreement was made in the telephone conversation between Winterberger and Martell on or about April 18, 1952 (R. 11), and the Court of Appeals noted that the trial "was solely concerned with the question whether the parties had agreed to the oral extension" (Petitioner's Appendix, 28).

Petitioner selects (Pet., pp. 13-14) a number of so-called "factors extraneous to the critical telephone conversation" which it claims lead to the "inevitable conclusion" that the alleged oral agreement was made. We need only say that each and every one of these "factors" was stressed again and again by petitioner in both Courts below and was shown by respondent to be entirely consistent with respondent's position that there was no agreement. The District Court disposed of petitioner's argument based on these factors by saying:

> "All the facts and circumstances relied upon by the libellant as proving an oral modification, we think, are as consistent with its non-existence * * *" (R. 12)

and the Court of Appeals upheld the District Court's findings as "not clearly erroneous." (Petitioner's Appendix, p. 28.) Cf. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342.

This Court, being a court of law "rather than a court for correction of errors in fact finding", should not undertake to review the findings of the two Courts below. *Graver Manufacturing Co.* v. *Linde Co.*, 336 U. S. 271, 275.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, August 26, 1957.

Respectfully submitted,

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